

(1959) 04 PAT CK 0004
In the Patna High Court
Case No : A.F.O.D. No. 175 of 1955

Munshi Banesh Prasad and Others

APPELLANT

Vs

Jalpa Shankar Varma and Others

RESPONDENT

Date of Decision : 24-04-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 11

Citation : AIR 1960 Patna 260

Hon'ble Judges : Raj Kishore Prasad, J

Bench : Single Bench

Advocate : Asghar Hussain and Awadh Kishore Prasad, for the Appellant; Aditya Narain Lall, Shambhu Nath II and Jagat Narain Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Raj Kishore Prasad, J.—This appeal by the plaintiffs is from the order of the court below rejecting their application for ascertainment of mesne profits on the ground that there was no direction in the decree for any such enquiry. There was no direction either in the judgment, or in the decree for ascertainment of mesne profits.

2. The original plaintiff, Akhauri Nandkishore Lal alias Nandu Lal, who, after his death, was substituted by the present plaintiff, Munshi Banesh Prasad, instituted a suit for possession and mesne profits. In paragraph 29 of the plaint, amongst the reliefs claimed by the then plaintiff, was relief No. 3, which was to the following effect:

"A decree may be passed in favour of the plaintiff against the defendants for the future mesne profits from the date of institution of the suit till the delivery of possession, on the receipt of additional court-fee."

3. This suit was instituted on the 13th February, 1943. The suit was, however, dismissed on the 17th May, 1943, and, ultimately the matter came up in second appeal to this Court--Second Appeal No. 1502 of 1956--at the instance of the

present plaintiffs-appellants. The appeal was disposed of by V. Ramaswami, J. sitting singly, on the 27th October, 1948. The appeal of the plaintiffs-appellants was allowed in part in the following terms:

"As regards the 12 dams of share of Mahuawan conveyed by five documents, Exts. A-2 (b), A-2(d), A-2 (e), A-2(f), and A-2(g), the appeal must succeed and the plaintiffs will be entitled to a decree for recovery of possession of this share of this milkiat."

4. The decree, which followed this judgment, also provided that:

"The decree of the court below be and the same is hereby modified to this extent that the plaintiffs are entitled to a decree for recovery of possession of 12 dams share of Mahuawan conveyed by five documents, Ext. A-2(b), A-2(d), A-2(e), A-2(f) and A-2(g)".

5. It is, therefore, manifest that the relief of the plaintiffs claiming mesne profits was not allowed in specific terms nor was it disallowed expressly. As a matter of fact, there is no order, one way or the other, on the question of mesne profits claimed by the plaintiffs in their suit. Accordingly, in the decree itself, as required by Order 20 Rule 12 (1) (c) of the CPC there is no direction directing an enquiry as to mesne profits.

6. In spite of the absence of any express direction in the judgment or decree granting the plaintiffs their claim for mesne profits, they applied under Order 20 Rule 12, Code of Civil Procedure, for ascertainment of mesne profits. A commissioner was appointed, and, his report was confirmed on the 17th April, 1951. On the 16th May, 1951 the respondent made an application for vacating the above order, which was, however, dismissed. Ultimately the matter was brought to this Court by the respondent 1 in its revisional jurisdiction, which was registered as Civil Revision No. 608 of 1952. It was disposed of by Rai, J. on the 1st May, 1953 in the following terms:

"It is not necessary for me at this stage to discuss the points raised on behalf of both the parties as the decree-holder has agreed that the application of the petitioner (that is, the present respondent) filed before the trial court be allowed and the order passed by the trial court dated 17-4-51 be set aside. The petitioner will now be at liberty to file objection to the report of the commissioner. With these observations the application is disposed of."

7. When the matter went back, the objection of respondent 1, who was defendant 3 to the suit was allowed by the learned Subordinate Judge and he held that in the absence of a direction in the decree, in terms of Order 20 Rule 12 (1) (c), of the CPC and in the absence of any indication in the judgment itself the plaintiffs-appellants were not entitled to get any mesne profits, and, therefore, there could be no ascertainment thereof. It is against this order that the present appeal has been presented by the plaintiffs.

8. It is not disputed that in the instant case, although the plaintiffs claimed both

possession and mesne profits in the second appeal also, this court while allowing the plaintiffs, to recover possession of some lands, did not in express terms, either allow or disallow mesne profits. It is manifest from the older portion of this Court, quoted in extenso earlier, and also from its judgment, that this court while awarding possession, intentionally omitted any reference to the claim for mesne profits. The judgment and decree both, therefore, are silent on the subject of mesne profits.

9. The question, therefore, which arises is: Are the plaintiffs in such circumstances, entitled to get mesne profits ascertained?

10. This question, in my judgment, must be answered in the negative when the claim for mesne profits was also made, but it was not in express terms, or even by implication allowed, it must be deemed to have been refused.

11. As far back as 1881, the Privy Council, in *Fakharuddin Mahomed Ahsan Choundhary v. Official Trustee of Bengal* 8 I.A 197 at p. 207 affirmed the doctrine that "where a decree is silent on the subject of interest or of Wasilat, interest or Wasilat cannot be added in the course of execution". In the case before their Lordships, however, the decree was not silent on the subject of Wasilat. On the contrary, it was expressly mentioned; and the term "possession with Wasilat" appeared in the decree which entitled the party to claim mesne profits. Their Lordships of the Privy Council accordingly upheld the order of the High Court that Wasilat was claimable up to the time of delivery of possession. The ratio of the above Privy Council case in my opinion, will govern the present case also.

12. In an unreported Bench decision of this Court in second Appeal No. 166 of 1945, *Lalji Singh v. Dwarika Singh*, decided by Das and Ma-habir Prasad JJ. a similar situation arose. In that case there was a specific issue on the question of mesne profits, but in the judgment nothing was said about mesne profits. The order portion of the judgment only declared the title of the plaintiffs and held that they were entitled to recover possession of the suit land, but the judgment did not say anything about mesne profits, in spite of the fact that there was a specific issue on that question. The decree, which followed the judgment, also accordingly did not mention anything about mesne profits. In the leading judgment delivered by Mahabir Prasad J. with whom Das J. agreed it was held:

"It is obvious that there being no direction in the decree passed in the suit for possession to the effect, that the plaintiff was entitled to mesne profits which he could get ascertained in a subsequent proceeding, the application filed by the plaintiffs with a prayer for appointment of a commissioner for ascertainment of mesne profits could not be entertained by the Court, and the Court clearly had no jurisdiction to institute any such proceeding."

In this view of the matter the decree for mesne profits passed by the court below in that suit was held to be without jurisdiction and set aside.

13. The above observation of Mahabir Prasad, J. was quoted with approval and

relied upon by Das, J. in a subsequent case, in Raghu Mahton Vs. Bulak Mahton and Others, .

14. The principles laid down by Das, J., as he then was, were, to quote the placitum, to the following effect:

"It is true that in empowering Courts to award future mesne profits, O. 20 R. 12, makes an exception to the general rule that a plaintiff can only sue on such cause of action as has arisen on the date of instituting his suit. But the plaintiff in such a suit cannot claim future mesne profits as a matter of right. The power of the Court to award mesne profits subsequent to the suit is discretionary, and a facie omission, as distinguished from a refusal to grant future mesne profits asked for, will not bar a fresh suit for that relief. It may even be open to the Court to grant future mesne profits as part of a general relief to which a plaintiff is entitled but it is not correct to say that the Court is obliged to award future mesne profits when no claim for mesne profits is made, or that, when a claim for mesne profits is made either specifically or as part of a general relief the Court must grant it

"It is well established that where a claim for mesne profits is made and refused, it is not open to the plaintiff to ask for an ascertainment of mesne profits. Similarly, when no claim for mesne profits is specifically made by the plaintiff and the Court awarding possession necessarily and intentionally omits any reference to a claim for mesne profits, it is not open to the plaintiff to say that the suit is still pending and he is entitled to make a claim for future mesne profits at a time when a large part of the claim is already barred by time. That the relief for mesne profits formed a part of the general relief prayed for in the plaint will not help the plaintiff."

15. If I may say so with respect, the above principles laid down by His Lordship represent the correct position in law, and, I express my cordial assent to the same.

16. In view of the above authoritative decisions, therefore, there is no doubt that the plaintiffs were not entitled to make an application for ascertainment of mesne profits, and, accordingly, the court below had rightly disallowed their application.

17. Mr. Asghar Hussain, who appeared for the appellants, relied on two decisions of the Calcutta High Court in Manmatha Nath Dutt and Others Vs. Matilal Mitra and Others, , and in Kalidas Rakshit Vs. Saraswati Dasi and Others, ; but, he rightly conceded that those decisions were not directly in point, in that, in those cases either intention to ascertainment of mesne profits was apparent from the judgment, or the plaintiffs right to mesne profits was found in the judgment, and, there was only failure to record express order under order 20 Rule 12 of the Code of Civil Procedure, and therefore, there was no direction in the decree and as such, it was held that omission to pass such an order, and, the omission of an express direction in terms of Order 20 Rule 12 (1) (c) of the CPC in the judgment

was at most a mere irregularity or an accidental slip which could be supplied by the court at any time; and, therefore, in such circumstances, the action of the court in assessing the mesne profits, as if an order was distinctly made in terms of Order 20 Rule 12, Civil Procedure Code, was held to be right, and not without jurisdiction. In the present case, there is no doubt that there is neither any indication of any such intention in the judgment itself, nor the plaintiff's right to mesne profits is found in it. In this view of the matter, such an intention cannot now be supplied or added to the judgment or the decree, when it is non-existent both in the judgment and the decree.

18. Mr. Shambhu Nath No. 11, who appeared for the respondent, referred to Section 11, Explanation V of the Code of Civil Procedure, which provides that any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused. It is well settled that a relief claimed in the plaint if not allowed must be deemed to have been disallowed, even in the absence of an express order disallowing it.

19. For the reasons given above, I hold that there is no merit in the appeal, and, accordingly it is dismissed; but in the circumstances of the case there will be no order for costs.