

(1869) 09 CAL CK 0018

In the Calcutta High Court

Case No : Regular Appeals Nos. 24 and 27 of 1869

Pratap Chandra Burua

APPELLANT

Vs

Rani Swarnamayi

RESPONDENT

Date of Decision : 10-09-1869

Acts Referred:

Citation : (1869) 09 CAL CK 0018

Judgement

Sir Barnes Peacock Kt., C.J., Kemp and Mitter, JJ.—The plaintiff in 1855 brought a suit to recover possession of land, and in that suit he asked for wasilat from the time of dispossession. As I understand the claim, it was for mesne profits from the time when the plaintiff was dispossessed up to the time of the decree. The Zilla Court decided the case in 1859, and held that the plaintiff was not entitled to possession. They said nothing as to the mesne profits, and it is clear that, in that suit, having decided against the plaintiff's right, they could not have awarded mesne profits. The plaintiff appealed to the High Court; and in 1863 that Court reversed the decision of the Zilla Court, and decreed that the plaintiff was entitled to recover possession; but the High Court did not decree any mesne profits whatever. The question is whether the plaintiff is entitled to bring a new suit for wasilat from the time the Zilla Court decreed the case in 1859 up to the time when the plaintiff obtained possession under his decree. It is contended that the plaintiff is not entitled to bring a separate action for those mesne profits. It is not very clear whether it is referred to us to determine whether his right is barred by reason of section 7 or by reason of section 196. It is clear that the question is not referred to us to decide whether the suit is barred by section 2, Act VIII of 1859, upon the ground that there has been a decision of a competent Court deciding against his right to the mesne profits. With regard to section 7, which Mr. Justice Norman says does not appear to have been sufficiently considered, it appears to me that the plaintiff was not bound to include in his suit, which he brought in 1855, a claim for the mesne profits from the time he might obtain a decree up to the time he might obtain possession under that decree. Section 7 says, "that every suit shall include the whole of the claim

arising out of the cause of action." The plaintiff's claim to mesne profits from the time he might obtain a decree to the time he might obtain possession under that decree was not a claim which he had at the time when he filed his plaint; and he would not therefore include that claim for mesne profits in his plaint. Independently of that, I think that he was not bound to include his claim for mesne profits in the suit for possession. Section 10 of Act VIII of 1859 is very clear upon that point. He is clearly not barred by reason of his not having included in his suit a claim for mesne profits from the date of the decree in 1859 to the time of his obtaining possession in the suit which he brought in 1855. He could not, in his suit commenced in 1855, have included a claim for mesne profits from 1859 to 1863.

2. It was contended (though I do not see that that point has been referred to us), that the suit will not lie, in consequence of section 11, Act XXIII of 1861, which enacts that "all questions regarding the "amount of any mesne profits which, by the terms of the decree, may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit "and execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit." The words all questions regarding the amount of any mesne profits in that section had been held by a Full Bench of this Court, in Mosoodan Lal v. Bhikari Sing Case No. 249 of 1865; 15th September 1866 (B.L.R. Sup. 602), not to mean questions relating to the right to mesne profits, but questions relating to the amount of mesne profits which are made payable by virtue of a decree. If the Court had held that plaintiff was entitled to recover the mesne profits and had ordered that the amount of these mesne profits should be assessed in execution, then this section would have applied; but inasmuch as the Court which had to decide the rights of the parties did not pass any decree with regard to mesne profits, those mesne profits were not payable under the decree within the meaning of that section, so as to authorize the Court of execution to assess the amount of it.

3. The Full Bench Decision of this Court in Mosoodan Lal v. Bhikari Sing Case No. 249 of 1865; 15th September 1866 (B.L.R. Sup. 602), to which I have referred, appears to be at variance with the decision on the same section of the Code by the Madras High Court in Chennappa Nayudu v. Pitchi Reddi 1 M.H.C.R. 453; but in a subsequent case of Lakshmi Narasimhalu v. Chatrazu Jagannadham Pantalu 3 M.H.C.R. 287, that Court stated that the High Court at Bengal has put a more restricted construction upon section 11, Act XXIII of 1861, than they had done; but they did not express any opinion as to whether they considered that decision to be right or wrong, as the decision of the case before the Madras High Court did not render it necessary for that Court to decide whether they concurred with the decision of the High Court of Bengal, or not. The High Court at Bombay, in the case of Radhabai v. Radhabai 4 B.H.C.R. A.C. 181, have concurred in the view which was taken by the Bengal High Court with regard to the construction of section 11. It does not appear to me that there is any sufficient ground for

thinking that the decision of Mosoodan Lal v. Bhikari Sing (1) is erroneous. The High Court at Agra have taken another view of this point. They seem to consider that where there is a decree for possession of land, it necessarily follows that there must be mesne profits to be awarded between the date of the decree and the time when the plaintiff obtain possession. That is. as I understand the Agra High Court decision in Oonkur Doss v. Heera Sing 1 Agra H.C.R. 141. It appears to me, however, that it is impossible to say that because a decree is passed holding that a plaintiff is entitled to possession of land, there necessarily must be mesne profits to be assessed for a period subsequent to that decree. It is clear I think that the execution of a decree for possession is not to be stayed so far as delivery of possession is concerned, until the amount of mesne profits from the date of delivery is ascertained in execution. If a plaintiff, having obtained a decree for possession, is not to be put into possession until the Court has ascertained what amount of mesne profits he is entitled to recover from the date of the decree, a local investigation may be ordered, and a very long period may elapse in ascertaining the amount of mesne profits, during the whole of which time the plaintiff must be kept out of possession and the defendant rendered liable to continuing mesne profits. If, then, the Court is justified in executing a decree for possession by putting the plaintiff into possession before it has assessed the amount to be paid for mesne profits subsequent to the date of the decree, it does not necessarily follow that the plaintiff will be entitled to have execution against the defendant for mesne profits subsequent to the date of the decree for possession. It appears to me that there is no more reason for saying that an amount for mesne profits subsequent to the date of the decree for possession will necessarily be payable, than there is for saying that interest will necessarily be payable under a decree for a principal sum of money. The question of the right to mesne profits is not to be tried in a Court of execution; the only thing a Court of execution is to try is the amount of mesne profits when mesne profits have been awarded by the decree.

4. It was urged that, u/s 196, the Court which awarded possession of the land was bound to award mesne profits from the date of the decree to the date of delivery of possession. It is admitted that the Court would not be bound to award mesne profits from the date of suit until the date of the decree if they were not sued for; yet it is contended that the Court which is not bound to award mesne profits from the date of suit to the date of decree, must award mesne profits from the date of decree to the date of delivery of possession, although the Court may have to investigate in another suit the right to, as well as the amount of mesne profits, from the date of dispossession to the time of the decree. I have frequently seen in suits for possession that the plaintiff, in consequence of the stamp duty which he would have to pay, if he claim mesne profits, postpones his claim for mesne profits until after his right to the land has been decided. Is the Court then bound, when it sees that a separate suit for mesne profits from the date of dispossession to the date of decree is likely to be necessary, of its own accord to award mesne profits from the date of the decree to the time of

obtaining possession? It may be that a separate suit for mesne profits is pending in another Court. In that case, is the Court which tries the right to possession, necessarily bound, u/s 196, to give a decree for mesne profits from the date of the decree to the delivery of possession, when it knows that there is a suit in another Court for mesne profits from the date of dispossession to the date of decree? If a separate suit should be pending in the Moonsiff's Court for mesne profits from the date of possession to the date of decree in which the Court will probably order a local investigation, is the Court in which the suit for possession is brought necessarily bound to give a decree for mesne profits from the date of decree to the date of possession, to be assessed in execution of his own decree by the Court of execution, which may render it necessary to have another local investigation as to the value of the land made by a different local Ameen? It appears to me that such a proceeding would be highly inconvenient and vexatious. I think the Court was not bound to award mesne profits from the date of decree to the date of possession. The words of section 196 are not compulsory. They are : the Court may provide in the decree for the payment of mesne profits "from the date of the suit until the date of delivery of possession." It is contended that the Court is not bound to award mesne profits from the date of suit to the date of decree, but only that it is bound to award them from the date of decree to the date of the plaintiff's obtaining possession. The question, then, arises, was the High Court, when, in 1863, it reversed the decision of the Zilla Court, and gave a decree for the plaintiff that he was to recover possession, bound to award mesne profits from the date of the decree of the lower Court in 1859, to the date on which the plaintiff should obtain possession under that decree, although it was not bound to award mesne profits from the date of the institution of the suit in 1855, down to the date of the decree of the Zilla Court in 1859? The contention is that the Court was bound to award mesne profits from the date of the decree in 1859 down to the time of the delivery of possession under the decree of the appellate Court, though it was not bound to award mesne profits from 1855, when the suit was commenced, to 1859, when the lower Court dismissed the plaintiff's suit for possession. It appears to me that the appellate Court was not bound to make any such decree, and that the fact of its not having made any such decree is not a ground for holding that the plaintiff is not entitled to maintain a separate suit for those mesne profits.

5. It therefore appears to me that section 196 does not bar the plaintiff's right to recover mesne profits for the period of six years next before the commencement of the suit, and that his suit is not barred by section 2, section 7, or section 196 of Act VIII of 1859. or by section 11, Act XXIII of 1861. The plaintiff is entitled to recover in this suit the mesne profits which accrued during the period of six years next before the commencement of the suit, exclusive of the period during which the plaintiff was in possession.

6. These cases will be sent back to the Division Bench with this expression of our opinion. The plaintiff will recover the costs of this reference.

Macpherson, J.

7. I also think that the suit is not barred u/s 7, or section 196, of Act VIII of 1859, or u/s 11 of Act XXIII of 1861, and it was not in my opinion necessary for the plaintiff, if he wished ever to recover wasilat, to ask for it and obtain an order for it in the suit which he brought for possession.

8. We have, in the discussion of this matter, rather lost sight of one part of the question which Mr. Justice Norman referred for our decision, which related to two cases which had been decided by Division Courts. The question referred was "whether, where the plaintiff, in a suit claiming possession with wasilat, after a decree against him in the first Court, has appealed only on the question of possession and obtained a decree "for possession only; without any mention of wasilat, and afterwards, in execution of that decree, obtains possession of the land so decreed, "he can in a fresh suit recover wasilat which might have been, but was not, adjudged to him in his former suit." The two decisions which induced the learned Judge to make the reference were based exclusively upon section 2 of Act VIII of 1859. So far as the question before us arises upon section 2, I am prepared to say that it appears to me still that my decision in the case of Balum Bhutt v. Bhoobun Lall 6 W.R. 78 (the facts in which are very similar to those in the case now before us) was right. What I decided there was that, substantially, the question of wasilat had never, in the suit for possession, been in issue in any Court, and had never been adjudicated upon; and that, therefore, a subsequent suit for wasilat was not barred u/s 2. If a matter has in fact not been in issue or adjudicated upon before, a suit in respect of it cannot be barred u/s 2.

Hobhouse, J.

9. I agree in the answer which is proposed to be given to the question before us. I understand that that question substantially is, whether the plaintiff in this case is entitled to mesne profits only for the years 1863 and 1864, or to mesne profits for the years 1859, 60, 61, 62, 63, and 64. It is said, as I understand the arguments, first, that the plaintiff is not entitled to mesne profits for the year 1863, because he did not include those mesne profits in the suit which he instituted in the year 1855; that is, it is said that he is barred by the provisions of section 7 of the Code of Civil Procedure, because he did not include the whole of the claim arising out of his cause of action in 1855. Now it seems to me that he did, in the case referred to, include the whole of the claim which arose out of his cause of action. That claim was, on the one hand, for possession of the land, and on the other hand, for mesne profits accruing upon that land; and he sued for mesne profits from the date on which he was dispossessed up to the date of his suit, and it appears to me that that was the whole of his claim at the particular time when he sued. I think, therefore, that the provisions of section 7 are no bar to the claim.

10. It is then said that the provisions of section 196 of the Code apply, and that

they bar the claim, and that is put upon the ground that the Court was bound under the provisions of that section to provide in the decree for the payment of mesne profits on the land in suit from the date of the suit up to the date of the delivery of possession. Now the words of that section do not bind the Court; that section does not say that the Court shall provide, but it says it may provide. The terms are distinctly permissive, and not obligatory; and unless we are shown some authority or some reasons why those terms should be deemed obligatory, which are in their common acceptance obviously only permissive, I think those terms must be taken to be what they are in their ordinary and natural construction, that is permissive. For this reason I think that the suit is not barred under the provisions of section 196 of the Code of Civil Procedure. Neither in my judgment is the suit barred by the application of the provisions of section 11, Act XXIII of 1861. The contention upon that section is, as I understand it, that inasmuch as the mesne profits, for which there is the present contention before us, were the mesne profits which were payable in respect of the subject-matter of the suit between the date of the institution of the suit and the execution of the decree, therefore any question as regards these mesne profits was a question which could alone be tried and determined by the Court executing the decree (that is the Court, in the present instance which passed the decree in 1863), and not, under the words of the Act by another Court in a regular suit. But that is a question which, it seems, has already been determined by the judgment of the Full Bench which the learned Chief Justice has quoted. By that judgment, as I understand it, it was held, that when the decree itself was silent as to any mesne profits payable at the time, to which the words of the section, which I have quoted, refer, then the Court which was executing the decree could not declare the amount of any such mesne profits, and could not award them. I think, therefore, for these reasons, that the suit is not barred by the provisions of section 11, Act XXIII of 1861.