
(1914) 12 MAD CK 0023
In the Madras High Court

Thavasi and Others

APPELLANT

Vs

Arumugam and Others
Muthukaruppayee Athal Vs
Valathal

RESPONDENT

Date of Decision : 02-12-1914

Acts Referred:

Specific Relief Act, 1877 — Section 9

Citation : (1915) 2 LW 157 : (1916) 30 MLJ 326

Judgement

1. The contesting defendants are the appellants in this Second Appeal. The suit was brought for the recovery of the mesne profits due to the plaintiffs for faslis 1314, 1315 and 1316 during which faslis the defendants were in unlawful possession of the plaintiffs' land. The plaintiffs had brought a former suit (Original Suit No. 131/05) u/s 9 of the Specific Belief Act in January 1905, very soon after they were forcibly dispossessed by the defendants. In that suit, they prayed for possession of the lands with the crops then standing thereon. But if before the decree was passed for possession, the crops were removed by the defendants, the plaintiffs also prayed for recovery of the value of the crops from the defendants.

2. The District Munsif in that suit decreed only possession of the lands, evidently because the question of the plaintiffs' right to the value of the crops depended upon the plaintiffs' title to the land and in a suit u/s 9 of the Specific Belief Act, the question of title could not be finally decided and need not be gone into. (See the Judgment Ex. IV). The Judgment in O.S. No. 131 of 1905 was passed on the 81st March 1906. The plaintiffs executed that decree and got possession in November, 1906, that is, about the middle of the fasli 1316, after the season for ploughing, sowing and cultivation had expired, such season being in August September 1906. If the defendants had given up the land before August 1906 to the plaintiffs, the plaintiffs could have begun cultivation in the due season of August 1906 and there would have been crops almost ripe for harvest in the middle of November 1906, when alone the plaintiffs were able to get possession through Court.

3. Such being the facts, several questions of law have been raised and decided in this case. The District Munsif held that because the defendants after the 31st March 1906 (the date of the decree in the Original Suit No. 131 of 1905 for possession), did not cultivate the lands and left them waste, the plaintiffs were not entitled to mesne profits for fasli 1316. He therefore decreed mesne profits only for faslis 1314 and 1315. The learned District Judge thought that the learned District Munsif was wrong in his opinion that the plaintiffs had negligently delayed the execution of their possessory decree beyond August 1906. The District Judge, therefore, allowed the claim for mesne profits for fasli 1316 which had been disallowed by the District Munsif; but the learned Judge disallowed the claim for mesne profits for fasli 1314 i.e., (mesne profits which the defendants wrongfully carried away in January 1905) on the ground that the plaintiffs having claimed such mesne profits in the former summary suit and not having been granted those mesne profits by the decree in that suit, the plaintiffs claim was barred by res judicata u/s 11 of the Civil Procedure Code, read with its explanation V. The decree passed by the learned District Judge contained an arithmetical error because, instead of allowing Rs. 160 (at Rs. 80 a year) for the two faslis 1315 and 1316 as mesne profits, a sum of Rs. 390 was mentioned in the decree.

4. Out of the 11 grounds mentioned in the memorandum of second appeal, the only two arguable¹ contentions are that the plaintiffs are not entitled to the mesne profits for fasli 1316 and that the decree of the Lower Appellate Court was not in accordance with the Judgment as it made the defendants liable for the mesne profits of the value of Rs. 390 instead of Rs. 160. The second contention based upon the clerical or arithmetical error is accepted as valid by the respondent's vakil, and it appears further that that error has been corrected by the Lower Appellate Court itself pending this Second Appeal. As, however, there is a memorandum of objections by the plaintiffs contending that the Lower Appellate Court's disallowance of the plaintiffs' claim for mesne profits for fasli 1314 is erroneous and as the whole of the disputed matter is now before us, this Court will draw up a proper decree in accordance with the rights settled by our Judgment in supersession of the Lower Appellate Court's decree. The only remaining contention, so far as the Second Appeal is concerned is that relating to the mesne profits for fasli 1316. Mr. C.S. Venkatachariar for the appellants argued that because the defendants did not cultivate the lands after the date of the decree in the former suit (31-3-1906) and left the lands waste, they were not bound to pay mesne profits for fasli 1316 though the plaintiffs were unable to raise and obtain any profits in that fasli. It is not alleged that the defendants gave notice to the plaintiffs to take possession of the lands as soon as the decree was passed against the defendants or that the plaintiffs Wilfully refused to take possession notwithstanding such notice. Section 2, Clause (12) of the CPC defines mesne profits as "those profits which the person in wrongful possession of such property actually received) or might with ordinary diligence have received." The defendants wrongful possession continued till the plaintiffs were

put in possession through Court, that is, till the middle of November 1906 and the defendants, if they had used ordinary diligence, could have cultivated the plaint lands in August 1906 and raised profits thereon. It was ingeniously argued that, as on the date of the taking of possession by the plaintiffs, the crops would not have been quite ripe for harvest even if they had been raised, the defendants could not have received any profits and hence they were not liable for mesne profits for fasli 1316. Of course, on a literal interpretation of the words in the definition of mesne profits, the argument is plausible enough; but, in any event, the plaintiffs are entitled to recover the loss which they sustained by the defendants' tortious act in having kept the plaintiffs out of possession and whether compensation for such loss is called "profits" or "damages" they are entitled to be reimbursed that loss. Such damages are, naturally, the profits which the plaintiffs would have got from the lands if the lands had not been wrongfully detained by the defendants in the beginning of the cultivation season in fasli 1316. This second appeal therefore fails except as regards the clerical error already referred to and is dismissed with the respondents' proportionate costs and the sum of Rs. 160.

5. Coming to the memorandum of objections, the question to be considered is whether the Lower Appellate Court was right in holding that the claim for mesne profits for fasli 1314 was barred by res judicata. The true scope of a suit u/s 9 of the Specific Relief Act has been considered in the case in Sheo Kumar v. Narain Das ILR (1902) A. 501 and Tilak Chandra Dass v. Fatik Chandra Dass ILR (1898) C. 803. In Sheo Kumar v. Narain Dass ILR (1902) A. 501 the following observations occur: - "Under the Specific Relief Act, the plaintiff would be entitled to recover possession in any event if he had been dispossessed otherwise than in due process of law, and, therefore, was entitled to a decree in the suit instituted under the Specific Relief Act, whether or not the defendants who had dispossessed him were the true owners. In a suit however, for mesne profits, other considerations would arise, because, as it appears to us, in a suit to recover mesne profits for the time during which a party has been dispossessed, if it be found that he was only a trespasser, and that the person who dispossessed him was the true owner of the property, in such a case, the Court could not award mesne profits as against the true owner. Therefore we think that the defence u/s 43 of the CPC fails". Thus it follows that a claim for mesne profits ought not to be made in a suit for possession under the Specific Relief Act because the plaintiff who was forcibly dispossessed could not obtain a decree for mesne profits if the defendant who dispossessed him forcibly was the true owner of the lands; the question of title could not be directly decided in that suit and a relief which depends upon title (considered apart from possession) cannot be given in such a suit. In Kuppusamy Aiyar and Another Vs. Venkataramier and Others, it was held by a Full Bench of this Court that the words "relief claimed in the plaint" in explanation III to Section 13 of the old CPC (corresponding to explanation V to Section 11 of the New Civil Procedure Code) did not include a relief which though claimed in the plaint, the plaintiff was not entitled to as of

right, assuming that the defence fails. Now in the former original suit, the defence did fail, but the plaintiff was not entitled as of right to the relief of the award of mesne profits which he claimed, because, as we said just now, the relief of the award of mesne profits depended upon a decision as to the plaintiffs' title which the Court trying a suit u/s 9 of the Specific Relief Act was not bound to decide. We therefore hold that notwithstanding the wide words of explanation V to Section 11, the plaintiffs are not barred by res judicata from claiming in the present suit based on title the relief as to mesne profits for fasli 1314.

6. Mr. C.S. Venkatachariar further contended that even if the suit is not barred by res judicata it is barred by Order 2, Rule 2, of the new CPC (corresponding to old Section 43), and he relied upon the Privy Council decision in Rangayya Gounden v. Nanjappa Rao ILR (1901) M. 491. There are at least two answers to this contention. In the first place, the plaintiff did not omit to sue in respect of or intentionally relinquish in the former suit his claim for mesne profits for fasli 1314 and hence Order 2, Rule 2 does not, in terms, apply. In the second place, even if he had so omitted to sue, the case in Sheo Kumar v. Narain Das (1902) L.R. 24 A. 501 clearly shows that the cause of action for mesne profits in an ordinary suit being different from the cause of action in the former summary suit, Order 2, Rule 2, corresponding to Section 43 of the old Civil-Procedure Code, has no application. We might further add that Order 2, Rule 2 directs only that the whole claim in respect of the same cause of action should be included in one and the same suit and it has been recently held by a Full Bench of this Court that the cause of action even for past mesne profits is a different cause of action from the cause of action in the suit in ejectment. See Ponnammal v. Ramamirtha Iyer (1914) 28 M.L.J. 127. We therefore allow the memorandum of objections with costs throughout on the amount awarded.

7. In the result, a decree will be drawn up in the suit awarding Rs. 240 as the mesne profits due to the plaintiffs for the three faslis 1314 to 1318. For similar reasons, similar decrees will be drawn up in the connected suits out of which connected Second Appeals 2008 and 2009 of 1913 have arisen.