

Ram Swarup and anr. Vs. Jitmal

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Court : Madhya Pradesh

Decided On : Oct-03-1963

Reported in : AIR1966MP186

Judge : H.R. Krishnan, J.

Acts : [Provincial Small Cause Courts Act, 1887](#) - Sections 15 - Schedule - Article 31; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 2(12) and 10 - Order 2, Rule 2 - Order 20, Rule 12

Appeal No. : Civil Revn. Appln. 446 of 1962

Appellant : Ram Swarup and anr.

Respondent : Jitmal

Advocate for Def. : S.L. Garg, Adv.

Advocate for Pet/Ap. : S.L. Dubey, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

H.R. Krishnan, J.

1. In this application in revision by the defendants in a small cause suit for mesne profits for a period well after the filing of the original suit we are concerned with four main grounds. Firstly, whether a suit for mesne profits claimed by the plaintiff as a liquidated amount of money is excluded by Article 31 of Schedule II of the Provincial Small Cause Courts Act, from the competency of that class of Courts. Secondly, whether a separate suit for mesne profits for a subsequent period is barred under Order 2 Rule 2 Civil Procedure Code when the plaintiff does not ask for it in the suit itself. Thirdly, whether Order 20 Rule 12 has any application at all to a claim of mesne profits in a separate suit. Finally, whether the fact that the judgment-debtor in the execution proceedings of the original decree has raised questions before it as to the measurement and location of the land that should have been delivered into the possession of the plaintiff, justifies the stay of a suit for mesne profits on the basis of the decree.

2. In so far as these proceedings are concerned the facts of the case are common ground. The opposite party brought a suit in the regular Civil Court for the declaration of his title and recovery of possession of a strip of land between his house and the house of the defendant-applicants. After contest the suit was decreed, the plaintiff's title declared and order made that possession should be restored. It may be noted even here that the original suit was for a strip of land demarcated and shown on the map, and again there was no prayer in the suit for mesne profits, past or future. After obtaining the decree and putting it into execution, the plaintiff brought the present suit for mesne profits at the rate of Rs. 30 per month payable by the defendant to the plaintiff. Naturally in view of the limitation the term for which the mesne profits were claimed was within three years (actually 29 months) from the date of this suit and long after the filing of the civil suit for declaration and possession. At the first instance this suit itself was filed in the regular civil court but it returned the plaint directing the plaintiff to file it in the Small Cause Court. The latter passed a decree for mesne profits not on the basis of any taking of accounts, but on the finding that for the use of the strip of land the defendant was liable to pay the plaintiff the amount claimed. It appears that in this interval the strip had been measured out and delivered into the possession of the plaintiff; but the judgment-debtor has afterwards filed an application before the executing court for remeasurement and revised demarcation.

Ground No. 1-

3. It is urged on the strength of Article 31 to Schedule II of the Provincial Small Cause Courts Act that a suit for mesne profits is not cognizable by the Small Cause Court. It is pointed out that various High Courts have taken conflicting views in this regard; but as a fuller examination will show it is only apparent. The article runs thus:

' 31. Any other suit for an account, including a suit for the profits on immoveable property belonging to the plaintiff which have been wrongfully received by the defendant. '

The most significant thing is that the term 'mesne profits' is not used, nor is the full definition of mesne profits in Section 2 (12) inserted. The exclusion is not of every suit for mesne profits per se but of a suit

'for account for the profit on immovable property belonging to the plaintiff which have been wrongfully received by the defendant.'

4. A good deal of the apparent conflict between the view points of the different High Court arises from the fact that a suit for mesne profits is very often, but not invariable, one for the taking of accounts. Naturally in several of the cases it was the actual position that the suit was either a straight one for taking accounts or was extremely analogous to a suit of that class and the Courts held that because of Article 31 the Small Cause Court had no jurisdiction. Sometimes the possibility of a suit for mesne profits which is not a suit for an account even on any analogy has been overlooked with the result that general statements have been made. But if one clearly bears in mind the basic concept of mesne profits on the one hand, and an account suit on the other, it will become clear that a suit for mesne profits as such is not excluded; if any suit, or as for that matter a large proportion of suits, for mesne profits have been excluded it is on the ground that they involve the taking of accounts.

5. The idea of an account suit has come up before the courts from time to time and as the case law now stands there is very little confusion in that regard. Among

other rulings the one reported in Radhakishan v. Motilal, AIR 1933 Nag 82, gives a clear description of an account suit as a class ;

'A suit for accounts is a suit for an indeterminate amount which could only be arrived at by taking the regular accounts between the parties. Where therefore the plaintiff sues for a definite sum and shows clearly how that sum is to be ascertained the suit is not one for accounts. The nature of the suit is to be determined according to the claim made by the plaintiff and not by the contest of the defendant. The latter procedure would give rise to the greatest confusion and eliminate from the jurisdiction of the Court of Small Causes many cases which would fall within that jurisdiction. '

Similar views have been expressed by other High Courts also. The test is not whether in course of the trial the Court is going to examine accounts in evidence, but whether the plaintiff's own claim is indeterminate and implies that further proceedings have to be gone through before the ascertainment of what is payable. If that is the position, the Small Cause Court having no competency to start independent proceedings for the ascertainment of accounts, it cannot exercise jurisdiction over account suits for that claim. If, however, the plaintiff is able to claim a liquidated amount without invoking any proceedings in account it is difficult to see how the jurisdiction of the Small Cause Court is excluded. The cases in which High Courts have remarked that a suit for mesne profits is not cognizable by a small Cause Court are ones where the suits under consideration were in effect suits for accounts or were understood to be such. In the Nagpur decision in Dukreeya v. Muktee Mahrin, AIR 1933 Nag 87, two types of suits for mesne profits are envisaged :

'A suit for mesne profits is not cognizable by a Court of Small Causes if the plaintiff by alleging that the defendant has actually received profits asks for an account of the profits received. But a suit for mesne profits in which there is no allegation that the defendant received any profits may be triable by a Small Cause Court as Article 31 does not state that they should be considered suits for an account.'

6. There may be suits in which the plaintiff claims a fixed sum without asking for accounts and alleges that the defendant has been receiving income out of his

property. Even there, as long as the defendant is not called upon to account for the collections, Article .31 may not operate. In the case reported in *Bharat v. Firanta*, AIR 1936 Nag 42, it was reiterated.

'A suit for mesne profits in which the plaintiff alleged that defendant had actually received some profits is one calling for an account and falls within the exception of Article 31 and so is not cognizable by a Small Cause Court.'

It is of further interest to note that the definition of mesne profits in Section 2 (12) is much wider than is implied in the wording of Article 31 :

'Section 2 (12)-Mesne profits of property means those profits which the person in wrongful possession of such property actually received or may with ordinary diligence have received therefrom'

A suit for accounts is based on the claim that the defendant has actually received such and such sums and should therefore, render accounts and pay them up to the plaintiff. But a suit for a fixed amount is on the assessment by the plaintiff of the income that can be reasonably expected from the property whether or not the defendant actually receives it. It may be, during the suit the defendant does by way of defence plead some accounts to prove that the collections have been less or nothing. It may even be the plaintiff may refer to actual collections made by the defendant as evidence in support of his claim of a fixed amount. But these do not make it a suit for accounts. The essential test is, whether the plaintiff is claiming a determinate or an indeterminate amount or whether the plaintiff's own case on this particular calls for further proceedings to investigate the actual realizations. By this test the present suit is not one excluded from the jurisdiction of the Small Cause Court by Article 31.

Ground No. 2 -

7. In the original suit the plaintiff did not claim mesne profits but long afterwards he claimed it for a period subsequent to the filing of the suit and at a fixed rate, having already won the suit and got a decree for possession of the property. It is a trite proposition that a person who does not ask for possession of a property cannot

claim mesne profits and one who fails to get possession cannot get it. It is equally clear that mesne profits for the period before the suit should be claimed on the date of the suit for the very simple reason that it is a cause of action which has already arisen on the date of the suit and failure to demand it would bar a future suit on the principles of Order 2 Rule 2 Civil Procedure Code.

8. In this connection the distinction made between past and future mesne profits in the ruling reported in *Ambika Prasad v. Shiv Shankar Dayal*, AIR 1963 Madh Pra 194 is instructive :

'A distinction has to be drawn between a suit for recovery of past mesne profits and a suit for recovery of mesne profits pendente lite or future mesne profits.'

If the plaintiff had claimed in the present suit mesne profits for any period for which he could have claimed it in the suit itself, he would naturally be barred by Order 2 Rule 2, because the cause of action had already arisen. I would in this regard apply the principles set out in *Mohammed Khalil Khan v. Mahbub Ali Mian*, AIR 1949 PC 78, in considering what a cause of action is and when it arises. Obviously the cause of action for a period long after the filing of the suit could not have arisen on the date of the suit itself and if a claim for mesne profits for that period is to be ruled out it must be on grounds other than the ones in Order 2 Rule 2. One of the grounds can conceivably be that the plaintiff had failed to sue for or obtain a decree for possession. Something like this arose in the case reported in *Gangabai v. Kanhaiyalal*, AIR 1953 Madh Bh. 161. There is obviously no point in trying to read the ruling which is of course a sound one, in the reverse and hold that a person who has asked for and obtained possession but has not claimed mesne profits in the first suit is debarred from claiming it in respect of a future period in a future suit. As held in the old Nagpur ruling reported in *Raghu v. Gujai* AIR 1918 Nag 242, possession and mesne profits can be claimed in separate suits, the only qualification being, besides limitation, that a person claiming mesne profits in a subsequent suit must have obtained possession in the earlier one which is exactly the position in the present case. Thus, I find nothing in Order 2 Rule 2 under which the suit can be dismissed.

Ground No. 3-

9. Order 20 Rule 12 has really no application to the present suit. All that it provides for is-

'Where in the same suit possession of immovable property and mesne profits or rent have been claimed, the Court may order an inquiry as to the mesne profits from the institution of the suit until the delivery of possession to the decree-holder or relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court.'

It has no bearing on a suit in which the plaintiff asks for declaration of title and possession only reserving, subject of course to limitation, his right to claim future mesne profits in a separate suit.

Ground No. 4-

10. It appears from the statements made at the bar and in the memorandum by the defendants that after the demarcation of the subject-matter of the suit and the delivery of possession to the plaintiff decree-holder in the first suit, the defendants have asked for a remeasurement and correction of the boundaries or the area of the strip that has already been given to the plaintiff. What measure of success they are likely to have we do not know; but that certainly is not a proceeding which would call for a stay of the present suit under Section 10 of the Civil Procedure Code or as for that matter under any other provision of law. It may be that the defendant is trying to reopen a settled controversy or it may be that there has been a mistake committed in the measurement which will be remedied. In the latter event if the area given to the plaintiff is substantially reduced in further proceedings they can certainly ask for a pro rata restitution out of the mesne profits awarded in this suit. But that question does not arise at this stage.

11. In the result the application is dismissed with costs and pleaders' fee according to rules payable by the defendant-applicants to the plaintiff opposite party.