Chitturi Subbanna

Vs

Kudapa Subbanna & Others

Civil Appeal No. 598 of 1961

(Raghuvar Dayal, J. R. Mudholkar, S. M. Sikri JJ)

18.12.1964

JUDGMENT

RAGHUBAR DAYAL, J. -

This appeal, presented on a certificate granted by the High Court of Andhra Pradesh, arises out of execution proceedings in execution of a decree dated March 7, 1938. Kudapa Subbanna, plaintiff No. 2 and respondent No. 1 here, was held entitled to the properties mentioned in Schedules A and C and to 1/24ths share in the properties mentioned in Schedule B attached to the plaint. The defendants in possession of the properties were directed to deliver possession to the decree-holder. The properties in Schedule B were first to be divided in accordance with the shares specified in para 9 of the plaint and the decree-holder was to be allowed the share to which the first plaintiff was shown to be entitled. The trial Court was directed to make an enquiry into the mesne profits from the date of the institution of the suit and pass a final decree for payment of the amount that be found due up to the date of delivery of possession to the second plaintiff. Possession over the properties in Schedules A and C was delivered to the decree-holder on February 17, 18 and 20, 1943. On June 23, 1945, the decree-holder filed I.A. 558 of 1949 to revive and continue the earlier I.A. 429 of 1940 which had been presented for the ascertainment of future profits and was struck off on September 25, 1944. On July 28, 1948, the Subordinate Judge decreed the mesne profits and interest thereon for the period from 1926-27 to 1942-43 with respect to the A and C schedule properties. The amount decreed was Rs. 17,883-8-3 including Rs. 10,790/- for mesne profits. He also decreed mesne profits with respect to the B-schedule properties upto 1946. They are not in dispute now.

On April 22, 1949, Chitturi Subbanna, 1st defendant, appealed to the High Court. The decree-holder filed cross-objections and claimed Rs. 19,000/- more stating that the amount of mesne profits actually due to him would be about Rs. 45,000/- but he confined his claim to Rs. 19,000/- only.

On September 13, 1958, the High Court dismissed the appeal, but allowed the cross-objection, the result of which was that the amount of mesne profits decreed by the Subordinate Judge with respect to the A and C schedule properties was increased very substantially. The amount decreed for mesne profits was raised to Rs. 17,242-12-0 and, consequently, the amount of interest also increased. Chitturi Subbanna then obtained leave from the High Court to appeal to this Court as the decree of the High Court was one of variance and the value of the subject matter in dispute was over Rs. 10,000/-.

Chitturi Subbanna, appellant, applied to the High Court for permission to raise an additional ground of appeal to the effect that the trial Court was not entitled to grant mesne profits for more than 3 years from the date of the decree of the High Court. The High Court disallowed that prayer for the

reasons that he had not taken such a ground in the memorandum of appeal and had, on the other hand, conceded before the Commissioner and the trial Court that accounts could be taken upto 1943 in respect of A and C schedule properties, that he had elected to have the profits determined by the trial Court upto the date of delivery of possession and that if he had taken the objection earlier, it would have been open to the second plaintiff-respondent to file a suit for the recovery of mesne profits beyond the three years upto the date of delivery of possession. It is urged before us for the appellant that the High Court was in error in not allowing the appellant to have raised the objection based on the provisions of O. 20, r. 12, C.P.C. We agree with this contention. The question sought to be raised was a pure question of law and was not dependent on the determination of any question of fact. The first appellate Court ought to have allowed it. Such pure questions of law are allowed for the first time at later stages too.

The appellant could not have claimed - and did not claim - a right to urge the new point which had not been taken in the grounds of appeal. He made a separate application for permission to take up that point. The procedure followed was in full conformity with that had been suggested in Wilson v. United Counties Bank, Ltd. (L.R. [1920] A.C. 102, 106.) to the effect :

> "If in exceptional cases parties desire to add new grounds to those of which they have given notice, it will usually be convenient, by a substantive application, to apply to the indulgence of the Court which is to hear the appeal."

In Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari ([950] S.C.R. 852.) this Court allowed a question of law to be raised at the hearing of the appeal even though no reference to it had been made in the Courts below or in the grounds of appeal to this Court. This Court said :

> "If the facts proved and found as established are sufficient to make out a case of fraud within the meaning of section 18, this objection may not be serious, as the question of the applicability of the section will be only a question of law and such a question could be raised at any stage of the case and also in the final court of appeal. The following observations of Lord Watson in Connecticut Fire Insurance Co. v. Kavanagh ([1892] A.C. 473) are relevant. He said : 'When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the court of ultimate review is placed in a much less advantageous position than the courts below."

Again, it was said in M. K. Ranganathan v. Government Madras ((1955) II S.C.R. 374, 381.) :

> "The High Court had allowed the Respondent 3 to raise the question even at that late stage inasmuch as it was a pure question of law and the learned Solicitor General therefore rightly did not press the first contention before us."

In Ittyavira Mathai v. Varkey Varkey (A.I.R. 1964 S.C. 907.) this Court did not allow the question of limitation to be raised in this raised in this Court as it was considered to be not a pure question of law but a mixed question of law and fact. This Court said at p. 911 :

> "Moreover, the appellants could well have raised the question of limitation in the

> High Court in support of the decree which had been passed in their favour by the trial Court. Had they done so, the High Court would have looked into the records before it for satisfying itself whether the suit was within time or not. The point now raised before us is not one purely of law but a mixed question of fact and law. No specific ground has even been taken in the petition made by the appellant before the High Court for grant of a certificate on the ground that the suit was barred by the time. In the circumstances, we decline leave to the appellant to raise the point of limitation before us."

The High Court had discretion to allow the application or to refuse it. The discretion exercised by the High Court is certainly not to be interfered with by this Court except for good reasons.

We shall deal with the reasons given by the High Court for rejecting the application and, in so doing, indicate why we consider those reasons not to be good reasons for disallowing the prayer made in the application.

In Rehmat-un-Nissa Begam v. Price (L.R. 45 I.A. 61.) the observations at p. 66 indicate that a discretionary order can be justifiably disturbed if the Court acts capriciously or in disregard of any legal principle in the exercise of its discretion. This, however, cannot be taken to be exhaustive of the grounds on which the discretionary order is to be interfered with. In this particular case the order passed by the High Court was not in conformity with the principle that a question of pure law can be urged at any stage of the litigation, be it in the court of the last resort.

There was no question of the appellant's conceding before the Commissioner that mesne profits could be legally allowed up to the date of delivery of possession. No party had raised the question as to whether mesne profits could be allowed up to three years subsequent to the date of the High Court decree or up to the later date when possession was delivered. When no such dispute arose, there was no question of the appellant's making any such concession. Similarly, no question of the appellant's electing to have the profits determined by the trail Court up to the delivery of possession could have arisen when no dispute about this matter had arisen between the parties. The utmost that can be said is that both the parties, the decree-holder and the judgment-debtor, were under the impression that mesne profits could be awarded till the date of delivery of possession as directed by the decree of the High Court. The fact that the appellant raised no such objection before the Commissioner or the trial Court, does not mean that he had given his consent for the determination of mesne profits for the period subsequent to the expiry of 3 years from the date of the High Court decree and that the order of the trail Court for the payment of mesne profits up to the date of delivery of possession is an order based on the consent of the parties.

In the circumstances of the case, we are not prepared to hold that the omission of the appellant to raise the point before the trail Court amounts to his waiving his right to raise the objection on the basis of O. 20, r. 12, C.P.C.

The case reported as London, Chatham and Dover Railway Co. v. South-Eastern Railway Co. (L.R. (1889) 40 Ch.D. 100.) is not to the point. The facts of that case were different. An agreement between two railway companies under the authority of an Act of Parliament contained a provision that all matters in difference between them would be referred to arbitration under the Railway Companies Arbitration Act (22 & 23 Vict. c. 59). Section 26 of that Act provided that full effect should be given by all the superior Courts of law and equity in the United Kingdom, according to their respective jurisdiction.... to all agreement, references, arbitrations and awards, in accordance

with the Act. This provision was construed not to oust the jurisdiction of the ordinary Courts, but in case of any party insisting on the compliance of the condition in the agreement of disputes being referred to arbitration, the Court was to stay its hands and to order the case to be withdrawn from the Court. The case was decided by the Court when an appeal against the finding that the agreement was valid was pending before the House of Lords. It is not clear and may, however, be assumed that one of the questions in the appeal was whether the jurisdiction of the Court was ousted if the agreement be a good one. The House of Lords and the Court of Appeal did not decide that point as it is noted at p. 101 :

> "but their Lordships expressly stated that the judgment of the House of Lords, and also the judgment of the Court of Appeal, only decided that the High Court of Justice had jurisdiction to try the question of the validity of the agreement, and did not decide the question whether the matters in dispute arising under the agreement ought to be tried by arbitration."

One of the parties applied to the Court to postpone the trial of the action on the ground that certain points other than the point regarding the ouster of jurisdiction of the Court were before the House of Lords for decision. The prayer was rejected. The parties went on with the trial of this action and got a judgment of the Court upon the evidence on the matter in dispute between them. It was urged in the Court of Appeal that the Court had no jurisdiction to try that matter and that it could be determined only in arbitration. The Court of Appeal said that the Court was deprived of its jurisdiction to determine the matters in dispute if neither party insisted on arbitration and that the parties ought not to be allowed to raise the point of jurisdiction. The reason given by Cotton, L.J., at p. 105, is stated thus :

> "If when they can insist on the Court not going into the merits of the case and deciding questions between the parties, they abstain from doing so, and are defeated on the merits, in my opinion it is too late to insist before the Court of Appeal on any right to object to the jurisdiction of the Court which they might have had if they had if they had insisted on it in a proper way and at a proper time."

In the present case the appellant did not let the trial Court determine the question of the period up to which mesne profits could be decreed, as he had raised no controversy in this respect. He did not take a chance of the judgment being given one way or the other and therefore the attempt of the appellant to raise the question in the High Court was not to get round the judgment of the Court which happened to go against him.

The Commissioner conducted the enquiry about mesne profits from August 29, 1946 till December 4, 1947. Suits for mesne profits for the periods between March 7, 1941 and February 28, 1943 could not be instituted in August 1946 as the period of 3 years' limitation for the institution of a suit for mesne profits of those years had expired by then. It follows that even if the appellant had raised the objection that mesne profits could not be decreed for the period subsequent to March 7, 1941, the decree-holder respondent could not have sued in Court for the recovery of those mesne profits when he had failed to sue for them within the specified period of limitation and therefore could not have been prejudiced by the appellant's raising the new ground at the hearing of the appeal.

We are therefore of opinion that the High Court was in error in not allowing the appellant to urge this additional ground before it.

The main point for determination in this appeal is whether mesne profits could be awarded to the decree-holder for a period subsequent to the expiry of three years from the date of the High Court's decree, i.e., subsequent to March 7, 1941. The contention for the judgment-debtor is that mesne profits cannot be awarded for the period subsequent to March 7, 1941 in view of the provisions of Order 20, r. 12, C.P.C. which reads :

> "12. (1) Where suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass decree -
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> (a) for the possession of the property;
>
> (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
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> (c) directing an inquiry as to rent or mesne profits from the institution of the suit until -
>
> (i) the delivery of possession to the decree-holder,
>
> (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
>
> (iii) the expiration of three years from the date of the decree,
>
> whichever event first occurs.
>
> (2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry."

It is urged that the direction in the decree for an inquiry into the mesne profits up to the date of delivery of possessions should be construed to mean a direction for an inquiry into the mesne profits up to the date of delivery of possession or up to three years from the date of the decree, whichever be earlier, as that would be consistent with what the law provides. In support of the contention, reference has been made to Girish Chunder Lahiri v. Shoshi Shikhareswar Roy (L.R. 27 1.A. 110.) and to other cases which followed that decision. The contention for the decree-holder is that the preliminary decree directed the enquiry into the mesne profits from the date of the institution of the suit up to the date of delivery of possession and that this direction in the decree cannot be ignored, when inquiring into the mesne profits or when passing the final decree, even if it be not in full conformity with the law laid down in r. 12 of O. 20. It has also been urged that the judgment-debtor is estopped from raising the contention that he is not liable to pay mesne profits subsequent to March 7, 1938 in view of his conduct amounting to his consent in the award of mesne profits subsequent to March 7, 1938. We have already held that the appellant's conduct did not amount to his consenting to mesne profits being decreed for the period subsequent to March 7, 1941.

There is no provision of law other than the provision of r. 12. O. 20, C.P.C. which empowers the Court to decree mesne profits subsequent to the institution of a suit for the recovery of possession of immovable property and mesne profits. It is not disputed for the respondent decree-holder that r. 12, O. 20, does not empower a Court to direct an inquiry and pass a final decree with respect to mesne

profits for a period exceeding 3 years from the date of the decree. This is very clear from the language of this rule. The only question is whether a decree wherein the Court does not mention the period for which mesne profits would be paid or the Court states that mesne profits would be payable up to the delivery of possession, should be construed to be a decree directing that mesne profits would be decreed for a period of 3 years from the date of the decree, if possession be not delivered within that period. The precedent case law is in favour of the contention for the appellant. The ratio decidendi mainly is that the Court had no power to pass a decree against the clear provisions of r. 12, O. 20, and that therefore the decree should be so construed as to be in accordance with these provisions.

The law with respect to the decree for mesne profits had been changing from time to time, but all the same expressions in the decree about the period for which mesne profits were to be awarded have been considered to be matters of construction and had been construed in accordance with the law at the relevant time.

Sections 196 and 197 of the Code of Civil Procedure of 1859 (Act VIII of 1859) dealt with the decree for mesne profits. Section 196 provided that when the suit was for land or other property paying rent, the Court might provide in the decree for the payment of mesne profits or rent on such land or other property from the date of the suit until the date of delivery of possession to the decree-holder, with interest thereon at such rate as the Court may think proper. It is to be seen that the Court was not merely to direct an enquiry about mesne profits and then to pass a decree as the present provisions require and that there was no limitation about decreeing mesne profits for a period of 3 years only from the date of the decree. Mesne profits could be decreed up to the delivery of possession. The decree was for mesne profits which were to be determined in execution.

In Fakharuddin Mohammed Ahsan Chowdhry v. Official Trustee of Bengal (L.R. I.A. 197.) the High Court decree declared the plaintiff to be entitled to possession of the land mentioned in the kabinnama with wasilat from the commencement of Srabun 1267 and did not say in express terms the time up to which the wasilat were to be paid. The plaint was also not very clear in stating the time up to which wasilat were claimed. The Privy Council construed the decree to award mesne profits up to the delivery of possession as the reasonable construction would be that the Court, with a view to carrying out the object of the legislature, viz., the prevention of unnecessary litigation and multiplication of suits, intended to give, with possession, that wasilat which was law claimable up to the time of possession.

Section 211 of the Code of Civil Procedure, 1882 (Act XIV of 1882) provided for decreeing the mesne profits up to delivery of possession or up to 3 years after the decree, whichever event took place earlier. The change of law therefore restricted the power of the Court to grant mesne profits to a period up to 3 years from the date of decree. In Girish Chunder's Case (L.R. 27 I.A. 110.) the Privy Council had to consider a decree for mesne profits which was passed when section 211 was in force. The decree in that case, which went up to the Privy Council, was passed in 1883 and had provided that the decree holder would get mesne profits for the period of dispossession. Possession over the village N was not recovered till 1892. The trial Court allowed mesne profits with respect to that village up to the date of delivery of possession. The High Court did not agree and allowed mesne profits for only 3 years after the date of the decree. It was said at p. 126 :

> "As to the village of N, their Lordships agree with the High Court. The Subordinate Judge gives the plaintiff mesne profits up to the date of possession. But that is more than three years from the date of the decree, and to the extent of the excess is

unauthorised by section 211 of the Code."

The principle enunciated in this case about the construction of the decree for mesne profits for the period of dispossession was followed subsequently by the various High Courts on the ground that the Court had no power to award mesne profits for the period beyond three years from the date of the decree and that therefore the decree should be construed to be subject to the condition that if possession is not delivered within three years of the decree, the mesne profits would be awarded for the period of three years from the date of the decree. These views were expressed in connection with decrees which either did not specify any period for the payment of mesne profits or expressly stated that mesne profits would be payable only until delivery of possession.

In Venkata Kumara v. Subbayamma (A.I.R. 1953 Mad. 226.), Uttamram v. Kishordas (I.L.R. 24 Bom. 149.) and Trailokya v. Jogendra (I.L.R. 35 Col. 1017.) the decree simply mentioned the starting point of the period for which mesne profits were decreed or for which an enquiry about them was to be made. It may be said, as urged for the respondent, that it was open to the Courts to construe the decree when the actual language of the decree did not indicate the other terminus of the period for which mesne profits could be claimed. It was however not so in Girish Chunder's Case (L.R. 27 IA 110.) where the decree provided that the decree holder would get mesne profits for the period of dispossession. Similarly in Godayarti Raja v. Ramachandraswami (A.I.R. 1943 Mad. 354.), Narayan v. Sono (I.L.R. 24 Bom. 345.), Kunwar Jagdish Chandra v. Bulaqi Das (I.L.R. [1959] 1 All. 114.) and Kanai Lal v. Shyam Kishore (I.L.R. 1959 Cal. 76.) the decree allowed mesne profits for the period of dispossession. It cannot be said that the decree in these cases was in any way vague or incomplete in the sense that its meaning was not clear. Yet in all these cases the Courts construed the decree in a manner as would make it in accordance with the law as laid down in r. 12, O. 20, C.P.C.

The decrees have been so construed not on account of the vagueness of the expressions used for decreeing mesne profits or directing the inquiry about mesne profits but on account of the fact that the decree for future mesne profits or directing enquiry about them is not based on the decision of any controversy between the parties but is made in the exercise of the discretionary power vested in the Courts by the provisions of O. 20, r. 12(1)(c), C.P.C. The Court is deemed to exercise the power in accordance with law and therefore a decree which decrees or directs enquiry about mesne profits for the period of dispossession or until delivery of possession is construed as a decree for mesne profits for a period of three years from the date of the decree if possession is not delivered within that period. This power was given to the Court in order to avoid multiplicity of suits between the decree-holder and the judgment-debtor for mesne profits which the decree-holder could rightly claim. The period was, however, restricted to three years in order to discourage decree-holders from making delays in taking possession. If a decree-holder be not diligent in executing the decree, he would have to forego mesne profits for the period in excess of three years or would have to institute separate suits to recover them. The Privy Council did not pass its order in Girish Chunder's Case (L.R. 27 I.A. 110.) on the basis of the decree being vague or incomplete. It simply held that the decree for a period in excess of three years was not authorized by section 211 of the Code of Civil Procedure of 1882.

We are therefore of opinion that it is open to the Court to construe the direction in the preliminary decree about the inquiry with respect to future mesne profits when such direction is not so fully expressed as to cover all the alternatives mentioned in O. 20, r. 12(1)(c), C.P.C. and to hold that the decree be construed in accordance with those provisions.

It is urged for the decree-holder respondent that the trial Court, when passing the final decree, could not have ignored what had been decreed under the preliminary decree as no appeal against the preliminary decree had been preferred and section 97, C.P.C., provided that where any party aggrieved by a preliminary decree passed after the commencement of the Code did not appeal from such decree, it would be precluded from disputing its correctness in any appeal which might be preferred from the final decree. The object of section 97 is that questions which had been urged by the parties and decided by the Court at the stage of the preliminary decree will not be open for re-agitation at the stage of the preparation of the final decree and would be taken as finally decided if no appeal had been preferred against the preliminary decree. The provisions of this section appear to be inapplicable to the present case.

The preliminary decree directed an inquiry about the mesne profits from the date of the institution of the suit up to the date of delivery of possession to the decree-holder. The decree-holder could not have felt aggrieved against this order. The judgment-debtor could not have felt insisted for detailing all the various alternatives mentioned in O. 20, r. 12(1)(c) and he could not have expected that possession would not be taken within three years of the decree. The direction about the enquiry with respect to future mesne profits does not amount to an adjudication and certainly does not amount to an adjudication of any controversy between the parties in the suit. It has no reference to any cause of action which had arisen in favour of the plaintiff-decree holder before the institution of the suit. The direction was given on account of a special power given to the Court under O. 20, r. 12(1)(c) of the Code to make such a direction if it considered it fit to do so. It was within the discretion of the Court to make the direction or not. The Court does not decide, when making such a direction, the period for which the decree-holder would be entitled to get mesne profits. No such point can be raised before it. The judgment debtor's lia-bility to mesne profit's arose under the ordinary law and a suit for realizing mesne profits could be separately field, by the decree-holder. The provisions of O. 20, r. 12(1)(c), are just to avoid multiplicity of suits with consequent harassment to the parties. The mere fact that the direction for an enquiry into mesne profits is contained in a preliminary decree does not make it such a part of the decree against which alone appeal could have been filed. The appeal could be filed only after a final decree is passed decreeing certain amount for mesne profits to the decree-holder. It follows that the question about the proper period for which mesne profits was to be decreed really comes up for decision at the time of passing the final decree by which time the parties in the suit would be in a position to know the exact period for which future mesne profits could be decreed in view of the provisions of O. 20, r. 12(1)(c).

The direction in the preliminary decree cannot operate, in terms of section 11 C.P.C. or on general principles, as res judicata for the simple reason, as stated earlier, that the direction is not based on the decision of any matter in controversy between the parties and is given in the exercise of the power vested in the Court under O. 20. r. 12(1)(c). Again, for similar reasons, the principle that a Court can decide a question within its jurisdiction wrongly as well as rightly and, if the decision said to be wrong had become final, the Courts have to respect it, will not apply to these cases.

We therefore hold that the judgment-debtor appellant is not precluded from contending that mesne profits could not be awarded for a period exceeding three years from the date of the decree.

We may now consider the question from another aspect. Rule 12, O. 20, C.P.C. requires the Court to direct, at the time of passing the preliminary decree, an inquiry as to mesne profits from the institution of the suit until the actual delivery of possession of the property to the decree-holder or until the expiration of three years from the date of decree whichever event first occurs. The Court at the time of the passing of the decree is not in a position to say which of the three events mentioned

in cl. (c) of sub-r. (1) of r. 12 will determine the period for which mesne profits would be payable to the decree-holder. Either, therefore, the Court has to repeat the various alternatives mentioned in this clause in the judgment and the decree which is to follow the judgment or the judgment and the decree for mesne profits is to be construed in accordance with these provisions. It is preferable to construe it in this way rather than to insist that the Court should mechanically repeat in the judgment and decree the various provisions of cl. (c). It may sometimes even happen that the enquiry into mesne profits is completed before the expiry of 3 years and that the final decree follow in due course while in fact no possession had been delivered by then. It would not be possible for the judgment-debtor to contend at that time that the decree has not been properly prepared and that it should state that in case possession is not delivered within the period of three years, mesne profits would be payable only for the period of three years from the date of the decree. It does not appear to be desirable that the passing of the final decree be put off till either possession is delivered or a period of three years had expired from the date of the decree.

Lastly, we may draw attention to a possibility of the decree-holder gaining by his own default, if he did not take possession for a period longer than 3 years after the date of the decree, when the decree did not specify the period for which mesne profits would be allowed or nearly stated that mesne profits would be paid until delivery of possession. The law did not contemplate such a case and therefore clearly provided the maximum period for which mesne profits would be allowed to the decree-holder after the passing of the decree. Such a case was Kunwar Jagdish Chandra v. Bulaqi Das. (I.L.R. [1959] 1 All. 114.)

We therefore hold that a decree under r. 12, O. 20 C.P.C. directing enquiry into the mesne profits, however expressed, must be construed to be a decree directing the enquiry into the mesne profits in conformity with the requirements of r. 12(1)(c) of O. 20 and that the decree-holder in this case cannot get mesne profits for the period subsequent to March 7, 1941 when the three year period from the date of the High Court decree expired.

The other question urged for the appellant is that the High Court was in error in arbitrarily fixing a higher amount of mesne profits than what had been adjudged by the trial Court which had itself arbitrarily increased the mesne profits suggested by the Commissioner. It was urged for the respondent decree-holder that even if the High Court had not given any reason for fixing the rate of mesne profits at a higher rate than the rate fixed by the trial Court, it must be presumed that the High Court had fixed the higher rate after considering the material on record and that therefore it cannot be said that the High Court had fixed mesne profits arbitrarily.

It is therefore first necessary to consider whether the High Court had given good reasons for decreeing mesne profits at a higher rate than that fixed by the trial Court. We are of opinion that the High Court had not really come to grips with the question of proper mesne profits and that it varied the rates in most cases, without expressing its reasons for holding that the Subordinate Judge was wrong in his finding regarding the quantum of mesne profits. This is clear from certain circumstances. The first is that the High Court overlooked the period of depression in considering the quantum of mesne profits.

The Commissioner divided the period of 17 years from September 1926 to March 1943 into three periods, viz., 1926 to 1930, 1931 to 1940 and 1941 to 1943. The middle period between the years 1931 and 1940 was a period of depression and the last period was one in which prices of commodities had risen to some extent on account of World War II. In view of these considerations, the Commissioner fixed the rate of profits from land differently for each period.

The trial Court fixed at first a normal rate i.e., a rate which was considered adequate for the first and the last period, then made allowance for the period of depression and calculated mesne profits at a lower rate for the ten years between 1931 and 1940. The High Court appears to have missed noticing the fact of the trial Court calculating mesne profits at a lower rate for the period of ten years. It fixed one rate for the period 1926 to 1940 and another rate for the period 1941 to 1943, and thus overlooked the long period of depression. It is on this account that the mesne profits ordered by the High Court are very much higher than what were fixed by the trial Court. If this fact had not been ignored, the difference between two amounts would not have been so much and might have been in the neighbourhood of Rs. 2,000 plus a corresponding increase in the amount of interest. The High Court appears to have missed this point as it was considered by the learned Subordinate Judge practically at the end of his judgment, at para 25. Below is given the Table showing reduced rates of profits allowed by the Subordinate Judge for the period the period 1931 to 1940 :

#----|----------|----------|---------- | | Profit allowed per | Profit allowed perSI. | Item of Schedule | acre by Sub-Judge | acre by Sub-JudgeNo. | | for periods 1926-30 | for period 1931-40 | | & 1941-43. |-----|----------|----------|----------1 | 1,4,8,12 of | Rs. 35 | Rs. 25 | A-Schedule & | | | C-Schedule | | | | |2 | 9 of A-Schedule | Rs. 50(for garden | Rs. 40(for garden | | produce) | produce) | | |3 | 10,11 of -do- | Rs.10 | Rs.7-8-0 | | |4 | 18 to 20 of -do- | Rs.30 | Rs.20 | | |5 | Rest of items of | No Change | No Change | A-Schedule viz., | | | 2, 3, 5, 6, 7, | | | & 13 to 17 | |-----|----------|----------|----------##

The second is that the High Court ordered profits at a rate higher than what was even claimed by the decree-holder in regard to item No. 9 of the A-Schedule properties. The trial Court fixed the annual profits at Rs. 50. The High Court said :

> "We are inclined to think that it is too low. We enhance the amount to Rs. 100 per year up to 1940 and to Rs. 150 for the years 1941 to 1943."

The Commissioner's report shows that the plaintiff claimed mesne profits for the mango grove at Rs. 150 per acre up to 1940 and later at Rs. 200 per acre, and thus claimed about Rs. 94 a year up to 1940 and about Rs. 126 a year for the later period, the area of the item being 63 cents. The High Court could not be justified to award the mesne profits higher than what are claimed by the decree-holder.

The third is that the finding of the High Court is not consistent with its reasoning with respect to items Nos. 10 and 11 which were pasture lands. The Commissioner suggested mesne profits at Rs. 10 per acre and said that tax on item No. 10 was at Rs. 6 per acre and on item No. 11 at Rs. 5 per acre. The Subordinate Judge fixed mesne profits at Rs. 10 for the 95 acres in area and the proper tax for these items at Re. 1. The High Court raised the rate of mesne profits to Rs. 20 for the period up to 1940 and Rs. 30 for the subsequent period, but confirmed the finding about the amount of tax. In making this order the High Court seems to have been under some confusion, for, the basis of its increasing the profits seemed to be the fact that the tax on these items was Rs. 5, as it said :

> "He (the Subordinate Judge) confirmed the finding of the Commissioner in this behalf. The Commissioner gives no reasons as to how he fixed the profits at Rs. 10 for the items. It is stated that the tax paid on the land is Rs. 5. We are inclined to think that it would be proper to fix Rs. 20 for the items up to 1940 and Rs. 30 for 1941 to 1943. The tax of Re. 1 deducted by the Subordinate Judge is confirmed."

The basis for raising the amount of mesne profits vanishes, when the High Court finally agrees with the Subordinate Judge that the tax would be Re. 1.

Another consideration is that the Subordinate Judge calculated mesne profits for item No. 12, consisting of dry land, at Rs. 35 per acre. The High Court enhanced the amount to Rs. 50 per acre, probably thinking that garden crops could be raised on this land as it said :

> "The learned Subordinate Judge stated in paragraph 18 that garden crops could be grown on the surrounding lands."
>
> "This is not a very precise summing up of what the Subordinate Judge had said in para 18 of his judgment. He stated there that the Commissioner had fixed profits for this item at Rs. 30 per acre per year as in the case of other dry lands and that he was fixing profits at Rs. 35 per acre as he had done so in respect of other dry lands. He however referred to observation of the Commissioner :
>
> "He observes that there is evidence to show that on the surrounding lands, garden crops were being raised and that there is no reason to hold that no such crops were raised on this item."

The Subordinate Judge did not fix rate on the basis that garden crops could be raised or were raised on the land of item No. 12 and fixed the rate on the basis that it was dry land. The Commissioner too does not appear to have fixed the rate on the basis that garden crops could raised on this land.

We may now consider how the High Court dealt with the various items of property in A and C Schedules to show that the variations made by it in the rates were not based on any basic material on the record. We refer to them in the order in which they were dealt with by the High Court.

Schedule A

Items Nos. 13 to 17 : The Subordinate Judge fixed the rent of these houses at Rs. 4 a month. The High Court raised it to Rs. 6 per month merely stating :

> "We are inclined to think that rent of Rs. 6 per month might be fixed in regard to these items."

The reasons given by the Subordinate Judge for fixing the monthly rent at Rs. 4 are, in his own words :

> "The Commissioner has however fixed the mesne profits for these items at Rs. 2 per month. The Union tax itself on this house appears to be Rs. 6-4-0 per year. The annual tax is generally equivalent to about 2 month's rent. The tax may be taken as a fairly correct basis for fixing the mesne profits. In that case, the rate fixed by the Commissioner is too low and I would fix the profits for these items at Rs. 4 per month."

Items Nos. 1, 4 and 8 : The Subordinate Judge fixed the actual profits for the land comprised in these at Rs. 35 per acre. His reasons were :

> "It is seen from the evidence of R.W. 26 that the prices of land and maktas rose about

> 10 years after China Bapanna's death which took place in 1915. If this statement were to be taken as correct and if, according to Exhibits P-10 and P-11, the rent realised by dry lands works out to Rs. 30 per acre, it cannot be said to be unreasonable or excessive to fix the profits on these dry lands at Rs. 35 per acre from 1925 onwards. It may also be remembered that prices rose after the close of the 1918 war. The Commissioner has fixed it at the rate of Rs. 30 only. I would however fix the profits on these dry lands at Rs. 35/- per acre per year and the petitioner would be entitled to profits at this rate on items 1 and 4 also from 1926."

The High Court reduced the rate of profits to Rs. 30 per acre for the period up to 1940 and raised it top Rs. 60 per year for the period 1941 to 1943 and stated, in this connection :

> "The learned Subordinate Judge increased the rent from Rs. 30 to Rs. 35 without giving any reasons. We are inclined to hold that in respect of all these three items, the rate ought to have been fixed at Rs. 30 per year up to 1940. After 1940 there was an increase in prices. We are inclined to hold that for all these three items the rate might be fixed at Rs. 60 per year for the period 1941 to 1943."

The High Court was in error in noting that the Subordinate Judge had given no reasons for raising the rate recommended by the Commissioner. It is really the High Court which gave no reason for lowering the rate up to 1940 and doubling the arte from 1941 onwards.

Items Nos. 9, 10, 11 and 12 : We have already dealt with items 9, 10, 11 and 12 and shown how the High Court had gone wrong in increasing the rate of profits from them.

Items Nos. 18 to 20 : The Commissioner recommended profits at the rate of Rs. 30 a year. The Subordinate Judge agreed with him and so did the High Court, for the period up to 1940. It however raised the rate to Rs. 60 a year from 1941 onward stating simply :

> "But, so far as the years 1941 to 1943 are concerned, we think it would be reasonable to fix the rate at Rs. 60 per acre."

Items Nos. 2, 3, 5, 6 and 7 : The High Court confirmed the findings of the Subordinate Judge with respect to the profits for the period up to 1940 but fixed the rate per bag at Rs. 10 for the period subsequent to 1941 stating :

> "However, for the years 1941 to 1943, we fix the rate per bag at Rs. 10-0-0 as the prices had increased after 1940."

Schedule C

The Commissioner allowed profits at Rs. per acre as in the case of dry lands. The Subordinate Judge fixed profits at Rs. 35 for the same reason as he had fixed that rate for dry lands of items 1, 4 and 8 of Schedule A. The High Court reduced the rate to Rs. 30/- relying on leases Exhibits P. 10 and P. 11 of 1915. It ignored the statement of R.W. 26, considered by the Subordinate Judge, that rents increased from 1925.

In view of what we have said above, we are unable to say that the High Court was right in considering the rates of profits fixed by the Subordinate Judge to be wrong and in increasing the rate of profits for most of the items of Schedule A and C and, especially, for the period between 1926

and 1940.

Two courses are now open for us. One is to set aside the decree for mesne profits and send back the case to the Court below for deciding it with respect to the quantum of mesne profits. The other is to set aside the decree of the High Court and restore that of the Subordinate Judge with respect to the quantum of mesne profits up to March 7, 1941, in view of the facts that the mesne profits awarded against the appellant are for the period between 1926 and 1943 and that any further enquiry about mesne profits would further put off a final decree for mesne profits. In view of such a consideration, learned counsel for the appellant had expressed, without prejudice, his client's agreeing to the calculation of mesne profits at the rate determined by the trial Court and, consequently, to the decree for mesne profits passed by that Court, but the learned counsel for the decree-holder respondent had stated that his client would prefer a fresh decision of the High Court on the point in case this Court found that the High Court was not justified to raise the amount of mesne profits. The respondent is more interested in the early finalisation of the mesne profits than the appellant and so we would order in conformity with his wishes.

We therefore allow the appeal with costs of this Court, set aside the decree of the Court below and remand the case to the High Court to determine afresh the quantum of mesne profits up to March 7, 1941, when the three years from the decree of the High Court expired and to dispose of the appeal according to law.

MUDHOLKAR, J. -

This is an appeal from the judgment of the High Court of Andhra Pradesh which arose out of a suit for possession and mesne profits instituted in the year 1926. The suit was dismissed by the trial court but on appeal the High Court of Madras passed a decree therein in favour of the second plaintiff who is the first respondent before us, on March 7, 1938. The decree which the High Court passed, in so far as mesne profits were concerned, was a preliminary decree and therein the High Court made the following provision with respect to the claim for mesne profits : "that the lower court do make an enquiry as to the mesne profits from the date of the institution of the suit and pass a final decree for payment of the amount that may be found due up to the date of delivery of possession to the second plaintiff."

No further appeal was taken by the first respondent, who is the appellant before us, against whom the decree was passed.

Respondent No. 1 obtained delivery of possession of some of the property with respect to which his claim had succeeded in the year 1943 and of another item of property on January 15, 1948.

On an application preferred by respondent No. 1 a Commissioner was appointed by the court of first instance for making an enquiry into mesne profits. After considering that report the court passed final decree for a certain amount in favour of respondent No. 1. In the course of the judgment it observed :

> "So far as the A and C schedule properties are concerned, there is no dispute about the mesne profits in regard to their having to be ascertained for a period of 17 years, i.e., from 1926 to 1943 February and for the mesne profits in regard to the B schedule properties being ascertained till 1946. The contest is only in regard to the quantum and not to the periods mentioned above."

The appellant preferred an appeal from the final decree before the High Court of Madras which was eventually transferred to the High Court of Andhra Pradesh. The appellant, however, did not raise any ground in his memo of appeal to the effect that mesne profits could not be awarded for a period in excess of three years from the passing of the preliminary decree. He had not raised this question either in his counter affidavit in answer to the application made by respondent No. 1 for the appointment of a Commissioner for determining mesne profits nor had he raised it before the Commissioner. On the other hand it was conceded before the Commissioner, as also the Subordinate Judge, that accounts can be taken up to the year 1943 in respect of the properties described in Schedules A and C to the plaint and up to 1946 in respect of properties described in Schedule B to the plaint. For the first time, however, when the appeal was argued before the High Court of Andhra Pradesh the appellant raised the contention that by virtue of the provisions of O.XX, r. 12 the respondent No. 1 was not entitled to the award of mesne profits beyond three years from the date of the preliminary decree. In regard to this objection the High Court observed :

> "As the appellant raised no dispute and elected to have the profits determined by the subordinate Judge up to the date delivery of possession we are not inclined to permit the appellant to raise this new ground of appeal."

However, as the decision of the High Court was open to further appeal it heard the parties on the new ground raised by the appellant and decided it against him. Along with the appeal the High Court dealt with the cross-objection preferred by the first respondent in which he claimed enhancement of the amount of mesne profits. The High Court dismissed the appellant's appeal and partially allowed the cross-objection preferred by the first respondent and modified the final decree passed by the court. Eventually the High Court granted a certificate to the appellant and that is how the matter has come up before us.

Two points were urged on behalf of the appellant before this Court. The first is that respondent No. 1 was not entitled to be granted mesne profits for a period beyond three years from the passing of the preliminary decree and the other is that the High Court was in error in enhancing the amount of mesne profits. Along with this appeal we have also heard an appeal preferred by the respondent which is C.A. 926 of 1963 in which he claimed a further enhancement of the amount of mesne profits.

I have had the advantage of reading the judgment of my learned brother Raghubar Dayal in which he has held that the High Court was in error in refusing leave to the appellant to raise a new ground at the stage of argument and after allowing it to be raised has upheld it. In regard to the second ground he has observed that the High Court was not right in raising the amount of mesne profits and has expressed the opinion that the matter be remanded to the High Court for fresh decision on the point. He has also expressed the view that the cross-appeal preferred by the respondent should be dismissed.

I am clearly of the opinion that the High Court was right in refusing leave to the appellant to raise a new ground at the hearing since not only had he not raised it in the memo of appeal but he had also allowed an enquiry into mesne profits by the Commissioner to be made, for a period longer than three years from the date of the decree and participated therein. The reason why a new ground ought not to be allowed to be raised at the hearing of an appeal has been so well stated by Lord Birkenhead in Wilson v. United Counties Bank Ltd. ([1920] A.C. 102, 106.) that I need do no more than reproduce what he has said :

> "The object of indicating in detail the grounds of appeal, both to the Court of Appeal and to your Lordships' House, is that the respondent parties may be accurately and precisely informed of the case which they have to meet. Their efforts are naturally directed to the contentions which are put forward by the appellants. They are entitled to treat as abandoned contentions which are not set forth. If in exceptional cases parties desire to add new grounds to those of which they have given notice, it will usually be convenient, by a substantive application, to apply to the indulgence of the Court which is to hear the appeal. In the present case, both in the Court of Appeal and before your Lordships, entirely new contentions have been submitted on behalf of the defendants. The practice is extremely inconvenient and ought in my judgment to be discouraged in every possible way." (Italics mine).

Further, we cannot lose sight of the fact that the grant of refusal of permission to raise a new ground was within the discretion of the High Court. The High Court has given very good and cogent reasons for refusing permission to the appellant to raise the new plea and not acted capriciously, as would be clear from the following passage in its judgment :

> "In the original grounds of appeal, no objection was taken as to the period for which mesne profits had to be paid. Before the appeal was taken up, the appellant sought to raise an additional ground of appeal viz., that the Subordinate Judge was not entitled to grant mesne profits for more than 3 years from the High Court's decree. This question was not raised in the counter affidavit in I.A. No. 558 of 1945 on the on the file of the Subordinate Judge, Eluru or before the Commissioner or before the Subordinate Judge. On the other hand, it was conceded before the Commissioner as also the Subordinate Judge that accounts can be taken up to 1943 in respect of A and C schedule properties and up to 1946 in respect of B schedule properties. It is for the time that this objection based on provisions of Order XX Rule 12 C.P.C. is raised before this Court. If the objection had been raised in the counter or before the Commissioner, it would have been open to the 2nd plaintiff to file a suit for recovery of the mesne profits beyond the 3 years up to the date of delivery of possession. As the appellant raised no dispute and elected to have the profits determined by the Subordinate Judge up to the date of delivery of possession, we are not inclined to permit the appellant to raise this new ground of appeal."

We would be going against all precedents as for instance the decision of the Privy Council in Rehmat-un-Nisa Begum v. Price (45 I.A. 61. LA Sup. 65.) and our recent judgment in Ittyavira Mathai v. Varkey Varkey (A.I.R. 1964 S.C. 907.) if we say that despite what the High Court did, we shall go into the question ourselves. In that case we have observed in col. 2 page 911 :

> "It would thus be clear that the appellant has not raised sufficiently clear plea of limitation by stating relevant facts and making appropriate averments. It is apparently because of this that the trial court, though it did raise a formal issue of limitation, gave no finding thereon. Nothing would have been simpler for the trial court to dismiss the suit on the ground of limitation if the plea was seriously raised before it. Had the point been pressed, it would not have been required to discuss in detail the various questions of fact pertaining to the merits of the case before it could dismiss the suit. In the plaint the respondents claimed that the period of limitation for the suit commenced on 15-2-1113 when the High Court dismissed the revision petition preferred by the respondents. The appellant has not stated that under Art. 47 of the

> Limitation Act, the period of limitation is to be computed not from the date of the revisional order but from the date of the original order. Had he done so, we have no doubt that the respondents would at least have placed on record by amending the plaint the date on which the plaint was instituted in the court of the Munsiff. Thus had the plaint been instituted in the court of the Munsiff say two months before the expiry of the limitation, the suit would have been within time on 4-3-1118 when the plaint was represented to the District Court, computing the period of limitation even from the date of the original order. Moreover, the appellants could well have raised the question of limitation in the High Court in support of the decree which had been passed in their favour by the trial court. Had they done so, the High Court would have looked into the records before it for satisfying itself whether the suit was within time or not. The point now raised before us is not one purely of law but a mixed question of fact and law. No specific ground has even been taken in the petition made by the appellant before the High Court for grant of a certificate on the ground that the suit was barred by time. In the circumstances, we decline leave to the appellant to raise the point of limitation before us."

We refused permission to the appellant to raise a new ground for two independent reasons. One was that the appellant had not raised a sufficiently clear plea in his written statement. The other was that the question was a mixed one of fact and law.

I am aware that in Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari ([1950] S.C.R. 852.) this Court has quoted with approval at pp. 861-2 the following passage from the decision in Connecticut Fire Insurance Co. v. Kayanagh ([1892] A.C. 473.) :

> "When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the court of ultimate review is placed in a much less advantageous position than the courts below."

But there a question of limitation had in fact been raised in the court below and what was sought by the appellant was leave to press in aid section 18 of the Limitation Act. It was in this connection that the observations quoted earlier were referred by this Court. Moreover, since this Court negatived the plea based on section 18 on the ground that the necessary facts were not established the approval of Lord Watson's view could at best be said to be a mere obiter.

We must also not lose sight of the principle that where a party omits to raise an objection to a direction given by the lower court in its judgment he must be deemed to have waived his right and he cannot, for the first time at the hearing of an appeal from the decision of that court challenge its power to make the direction. In London Chatham and Dover Railway Co. v. South Eastern Railway Co. ([1889] 40 Ch. D. 100, 106-109.) all the Lords Justices of the Court of Appeal have emphatically said that an omission of a kind of which the appellant in this case is guilty must be treated as a waiver even of a plea of jurisdiction. In that case there was an agreement between the parties, two railway companies, which provided for a reference of all matters of difference between them to arbitration under the Railway Companies Arbitration Act. Section 26 of the Act required the court where one of the parties to the agreement insisted upon it, to give effect to and to act in

accordance with the agreement, so far as the submission to arbitration was concerned. The defendant pleaded the arbitration agreement in defence while the plaintiff challenged its validity. A question was raised by the defendant about the competency of the court to adjudicate upon the validity of the agreement. The trial Judge held in favour of the plaintiff and his decision was upheld by the court of appeal. The defendent took the matter to the House of Lords and while the appeal was pending there the case came up before Kekewich J. One of the questions in the appeal was whether, if the agreement was a good one, the jurisdiction of the Court was ousted. The defendant made an application for postponement of the action because certain other points decided by the Court of Appeal which had gone to the House of Lords would be material. But the defendant did not say in the application that the question about the jurisdiction of the Court was also before the House of Lords and that for this reason it ought not to be put to the trial of the action till it was finally decided. The trial then proceeded and judgment was given on the basis of the evidence. When the matter went to the Court of Appeal the defendant contended that the Court had no jurisdiction to go into the merits of the case. Negativing it, Cotton L.J. said :

> "..... the defendants did not say, 'While the decision in the House of Lords is pending we cannot contend that this point ought to go to an arbitrator, but we do not abandon it, we still desire to keep it open;' but they go on with the trial and they get the judgment of a Court upon the evidence on the question which they now say the Court ought never to have entertained. In my opinion parties ought not to be allowed to do that. If when they can insist on the Court not going into the merits of the case and deciding questions between the parties, they abstain from doing so, and are defeated on the merits, in my opinion it is too late to insist before the Court of Appeal on any right to object to the jurisdiction of the Court which they might have had if they had insisted on it in a proper way and at a proper time." (p. 105).

Lindley L.J., observed :

> "Having regard to the course which was adopted in the Court below, I think the Defendants must be treated as having waived this objection in the Court below, and it would not be right for us to entertain it on appeal." (p. 107).

Bowen L.J., agreeing with the other Lords Justices said :

> "I agree with the Lord Justice that here, if the point had been taken and insisted upon from the first, there might have been no answer to it; but, at all events, when the point is not taken from the first, it is to be treated as having been abandoned in that way; and when a point such as this is waived and not insisted upon, the Court is not compelled at any stage of the litigation to go back and treat the parties who have waived it as parties who have not done so."

This is not an isolated decision, nor indeed does it lay down a novel rule of practice. It is right and proper that parties to a litigation should not be permitted to set up the grounds of their claims or defence in driblets or at different stages and embarrass the opponents. Considerations of public policy require that a successful party should not, at the appellate stage, be faced with new grounds of attack after having repulsed the original ones. The proper function of an appellate court is to correct an error in the judgment or proceedings of the court below and not to adjudicate upon a different kind of dispute - a dispute that was never taken before the court below. It is only in exceptional cases that the appellate court may in its discretion allow a new point to be raised before

it provided there are good grounds for allowing it to be raised and no prejudice is caused thereby to the opponent of the party permitted to raise such point. But where the appellate court in exercise of its discretion refuses leave to a party to raise such point there is little scope for any indulgence being shown by this Court. This would suffice to dispose of the question whether mesne profits could awarded till the date of delivery but as my learned brother has considered that question on merits, I must deal with it as well.

I regret my inability to agree with decision of my learned brother on the merits of the first point. There is no doubt whatsoever that under O.XX, r. 12(c) of the Code, a court has to direct enquiry as to mesne profits from the date of institution of the suit until (i) the delivery of possession to the decree-holder; (ii) the relinquishment of possession by the judgment-debtor and notice to the decree-holder through the Court or (iii) the expiration of three years from the date of the decree, whichever event occurs first. Therefore, when the Madras High Court passed a preliminary decree on March 7, 1938 it ought to have given directions with regard to the determination of mesne in the manner provided for in cl. (c) of r. 12(1) of O.XX, C.P.C. The High Court however, chose to make only a single direction and that is that mesne profits be determined up to the date of the delivery of possession and nothing more. It may be that the High Court did not expect that the delivery of possession would be delayed beyond three years of the passing of the decree or that the High Court over-looked the possibility of possession being delivered more than three years after its decree. Therefore, it does not necessarily follow that the failure of the High Court to make it clear that in any case the determination of mesne profits shall not be for a period in excess of three years from the date of preliminary decree was an error. Even assuming that the direction in the preliminary decree that mesne profits shall be determined and consequently will be payable right up to the date of delivery of possession, whenever the event occurred, was wrong, that decision has to be given effect to. This decree, as already pointed out, was not challenged by taking a further appeal and has, as between the parties, become final by the operation of the provisions of section 97 of the Code of Civil Procedure which says :

> "Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from the final decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

The appeal before us is an appeal from the final decree and, therefore, the appellant is precluded from making a challenge to direction in the preliminary decree. I am fortified in this view not only by what we have said in Ittyavita Mathai's case (A.I.R. 1964 S.C. 907.) in para 8 at p. 910 but also by the recent judgment of this Court in Smt. Gyarsi Bai & Ors. v. Dhansukh Lal & Ors. ([1965] 2 S.C.R.). There, Subba Rao J., speaking for the unanimous Court has observed :

> "In a case where a decree is made in Form No. 5A, it is the duty of the Court to ascertain the amount due to the mortgagee at the date of the preliminary decree. How can the amount due to the mortgagee as on the date of preliminary decree be declared unless the net profits realized by him from the mortgaged property are debited against him ? The statutory liability of the mortgagee to account up to the date of the preliminary decree would be the subject-matter of dispute in he suit up to the date of the said decree. The Court has to ascertain the amount due under the mortgage in terms of the mortgage deed and deduct the net realizations in the manner prescribed in section 76(h) of the Transfer of Property Act and ascertain the balance due to the mortgagee on the date of the preliminary decree. If the mortgagor did not raise the

> plea, he would be barred on the principle of res judicata from raising the same, as the said matter should be deemed to have been a matter which was directly and substantially in issue in the suit up to the stage. It is settled law that though a mortgage suit would be pending till a final decree was made, the matters decided or ought to have been decided by the preliminary decree were final. Suppose the mortgagor paid certain amounts to the mortgagee before the preliminary decree; if these were not given credit to the mortgagor and a larger amount was declared by the preliminary decree as due to the mortgagee, can the mortgagor, after the preliminary decree, reopen the question ? Decidedly he cannot. This is because the preliminary decree had become final in respect of the disputes that should have been raised before the the preliminary decree was made."

That the general principles of res judicata would apply to such a case as this was held long ago in Ram Kirpal Shukul v. Mussumat Rup Kuari (11 I.A. 37.) and the view taken therein has been followed by this Court in Gulabchand Chhotalal Parikh v. The State of Bombay (now Gujarat). ([1965] 2 S.C.R. 546.)

It is, however, contended that what the appellant seeks in this appeal from the final decree is merely an interpretation of a direction in the preliminary decree and that that direction should be construed in such a way as to make it a decree according to law i.e., in accordance with the provisions of O.XX, r. 12, C.P.C. The question of construction of a decree can only arise where the decree is ambiguous. A number of cases were relied upon before us on behalf of the appellant and some of them have been discussed in the judgment of my learned brother as also in the judgment of the Full Bench in Kudapa Subbanna v. Chitturi Subbanna & Ors. (Appeal No. 368 of 1956 decided on 23-2-1962.) That decision is the subject of the appeal preferred by respondent No. 1 in C.A. No. 926 of 1963. It may be conceded that where the meaning of a term of a decree is not clear or is ambiguous the question of construing that term would arise. In such a case the court whose duty it is to construe it would be doing the right thing in placing upon it a construction which will make it conformable to the law. The direction in question contained in the preliminary decree of the High Court does not, in my opinion, suffer from vagueness, ambiguity or such incompleteness as will make its enforcement impossible. It may be that the High Court in making the direction wrongly thought that it had discretion to specify any of the three events set out in cl. (1)(c) of r. 12 of O.XX or that it expected that possession would be delivered by the appellant to the respondent before the expiry of three years. Or it may be that the High Court had overlooked the limitations placed upon the power of the Court by the concluding part of cl. (c) of O.XX, r. 12(1). But whether it was one or the other, does not render the direction in question vague, ambiguous of incomplete. In order to ascertain whether a particular term or direction in a decree is clear and complete or vague and ambiguous the court must ordinarily confine its attention to the direction itself. It will be justified in looking to the other provisions in the decree if there appears to be doubt about the meaning of its terms or if any of the terms conflict with another part of the decree. But where there is no such doubt or conflict the occasion to look at the other terms of the decree cannot arise. It is, however, not the suggestion of Mr. Viswanatha Sastri that this particular term is inconsistent with any of the other terms of the decree. His argument is that if the term is taken by itself it would be in conflict with law and we must read in it the whole of the provisions of O.XX, r. 12(1)(c). But then the High Court has clearly selected only a portion of this provision and made that alone as a term of its decree, omitting the rest of it. The argument of learned counsel in substance amounts only to this : that the High Court in acting in this manner committed an error of law, but mere error of law does not vitiate the direction made by the High Court. Even assuming that one of the terms of a decree is erroneous in law the decree is nonetheless binding upon the parties until and unless it is corrected in appeal or other

appropriate proceeding. Such a decree cannot be treated as one which was passed without jurisdiction. For, it is well settled that while it is the duty of a court to decide right it may well happen that it decides wrong. Whichever way it decides, it acts within its jurisdiction and not beyond it, as was observed by the Privy Council in Malkarjun v. Narhari (27 I.A. 216.) which was followed by this Court in Ittyavira Mathai's case (A.I.R. 1964 S.C. 907.). A wrong decision is no doubt vulnerable but it does not automatically be come unenforceable. Unless corrected in the manner provided for in the Code it will operate as res judicata between the parties in all subsequent stages of the lis.

I have not thought it necessary to discuss the various decisions cited at the Bar and noted by my learned brother because the decrees construed in them were found to be vague or incomplete. To my mind it would not be right for a court to characterise a term of a decree which upon its face appears to be clear and complete, as being vague or incomplete merely because in its view that term is erroneous and then proceed to interpret it. So far as a Court whose duty it is to give effect to a decree of a Court of competent jurisdiction is concerned it is immaterial whether the term or direction as it stands is contrary to law. So long as it is, on its face, complete and capable of enforcement it has no power to go behind. For these reasons I am of opinion that the first contention raised on behalf of the appellant must fail.

As regards the question of quantum of mesne profits I agree with my learned brother that the High Court has given no good reasons for enhancing the amount. In dealing with various items it seems to have proceeded on assumptions or raised the rates of profits to be allowed without referring to the basis for the enhancement. In the circumstances I would agree to the course proposed by him.

The appeal, therefore, succeeds only partially and in the circumstances the appropriate order for costs would be for each party to bear its costs in this Court.

Appeal allowed.

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