

CALCUTTA HIGH COURT

Kanai Lal Maity

Vs.

Shyam Kishore Das

A.F.A.D. No. 1274 of 1954

(K.C. Das Gupta and U.C. Law, JJ.)

22.04.1958

JUDGMENT

K.C. Das Gupta, J.

1. In the suit brought by the present appellant against these respondents he obtained a decree, the relevant portion of which way in the following terms :

"Plaintiff's title to the lands of Schedule Ka to the extent of 1/5th share is hereby declared. He will get possession therein and will remain in possession of the same jointly with the defendants, Plaintiff's exclusive title to the lands of Schedule Kha is declared. He will get khas possession therein by evicting the defendants therefrom. His claim for damages or compensation is dismissed. He will get mesne profits in respect of the lands of Schedule Kha so long as they remained in possession of the defendants. The amount of the same will be determined hereafter in accordance with law." This decree was made on 13-3-1951. We are informed that the plaintiff actually recovered possession of the Kha Schedule land sometime in May 1954. Long before this date, on 5-5-1951 he made an application for the appointment of a Commissioner for investigation as regards the mesne profits. The Commissioner reported that the plaintiff was entitled to a sum of Rs. 854/- on account of mesne profits in respect of produce grown in the land for the years 1354 to 1357, that he was also entitled to a sum of Rs. 659-9-0 for the years 1353 to 1357 in respect of profits out of standing, fruit bearing trees, that he was further entitled to a sum of Rs. 283-12 in respect of trees cut and taken away including Velki bamboos and finally to a sum of Rs. 250/- in respect of fish taken from the tank.. The trial Court accepted this report and after making some further provisions in respect of mesne profits for the year 1358 in respect of produce grown in the lands and mesne profits out of standing fruit trees and also as regards fish taken from the tank held that the plaintiff was entitled to a decree for mesne profits for Rs. 2260-13-0 and after the plaintiff paid additional court-les in

view of sums now assessed he made a decree in his favour for a sum of Rs. 2300-13-0. The defendants appealed. The learned judge who heard the appeal considered himself free to examine the correctness of the preliminary decree which had been made in March 1951 and held that the plaintiff was not legally entitled to recover any mesne profits from his co-sharers in respect of either of the plots in Schedule Kha save and except a sum of Rs. 200/- on account of price of bamboos cut down and appropriated by the defendants out of C.S. plot No. 162. He also refused to accept the Commissioner's finding as regards mesne profits in respect of fish. Accordingly, he set aside the trial Judge's order directing the payment of Rs. 2260-13-0 on account of mesne profits and directed the defendants to pay a sum of Rs. 200/- only on account of mesne profits.

2. The first question raised on behalf of the appellant against the decree of the lower appellate court is that the learned Judge was not free to consider the legality of the preliminary decree. No appeal was taken against that preliminary decree and so the learned Judge in ascertaining the mesne profits was bound to proceed on the basis that the decree for mesne profits was correctly made. This is certainly the correct legal position and Mr. Guha who appeared before us on behalf of the respondents conceded at once that he was unable to support the view of the learned court below that the correctness of the preliminary decree could be questioned by him. He, however, contended that the application for mesne profits should be rejected on the ground that it was premature. He has drawn our attention to the provisions of clause (c) of Order 20 Rule 12(1) which provides that the enquiry as to mesne profits under this clause may be for the period from the institution of the suit until (1) the delivery of possession to the decree-holder (2) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or (3) the expiration of three years from the date of the decree whichever event first occurs. The argument is that only 'if three years from the date of the decree has expired or even prior to that possession has been delivered to the decree-holder through Court or possession has been relinquished by the judgment-debtor with notice to the decree-holder through Court that an enquiry can be made. From the words of the preliminary decree passed in this case which have already been set out we find that the learned Judge did not state in so many words that the enquiry should be as regards mesne profits from the institution of the suit until the delivery of possession to the decree-holder or the relinquishment of possession by the judgment-debtor or the expiry of three years from the date of the decree whichever event first occurs. He merely said that the plaintiff will get mesne profits in respect of the lands of Schedule Kha so long as they remain in possession of the defendants, but added that the amount will be determined hereafter in accordance with law. Reading the judgment as a whole we must take the direction in the decree to amount to a direction in accordance with the provisions of clause (c) as set out above. It is proper, therefore, to hold that plaintiff was entitled under this decree to mesne profits from the institution of the suit until the delivery of possession to the decree-holder or the relinquishment of possession by the judgment-debtor with notice to the decree-holder or the expiration of three years from the date of the decree whichever event first occurs. From this it by no means follows, however, that no enquiry can commence till the three years have expired or prior to that delivery

of possession a relinquishment of possession has taken place. For that conclusion the learned Advocate relies on the provisions of sub-rule (2) of Order 20 Rule 12 which are in these words :

"Where an enquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be based in accordance with the result of such enquiry".

If an enquiry has taken place as regards mesne profits for a period commencing from the institution of the suit till a date which is previous to the expiration of three years from the date of the decree or to the earlier delivery of possession or the relinquishment of possession by the decree-holder, the consequence according to Mr. Guha would be that the plaintiff would have to be content with a decree for only part of the period to which the decree entitles him and he will have to give up part of his rights under the decree. The reasonable conclusion he suggests is that it is only when one of the three events indicated in clause (c) has occurred, namely, either three years have expired from the date of the decree or prior to that delivery of possession or relinquishment of possession by the judgment-debtor has taken place that the right to apply for enquiry accrues.

3. If the inevitable position in law had been that once an enquiry is made and on the basis of the results of the enquiry a decree is made as regards part of the period for which the plaintiff was entitled to mesne profits, no other application can be made and no further decree can do made. There would have in my opinion been some force in the contention raised by the learned Advocate. In my opinion, it is by no means clear that this is so. I can see no reason why because in terms of a preliminary decree which has already been made for mesne profits in favour of the plaintiff from the institution of the suit for the period to which he is legally entitled one decree is made for part of the period, a further decree cannot be made for the remaining part of the period. There is nothing in Order 20 rule 12 or any principle of law to prevent a fresh application being made and a fresh decree being made for such relief in terms of the decree already obtained. The mere fact that sub-rule (2) speaks of a final decree to be passed in accordance with the results of such enquiry does not in my opinion produce the consequence that no other decree can be made previous to that final decree. It is in my opinion eminently just and convenient that a successful plaintiff should be allowed to get part of the mesne profits as early a possible. Many years may have passed from the institution of the suit till the date of the decree and I can see no justification in rules of justice equity and good conscience that should compel him to wait for three years from the date of the decree or the delivery of possession or the relinquishment of possession which in many cases may not take place within these three years. Nor can I see any reason in the rules of justice, equity and good conscience which would stand in the way of a successful plaintiff getting after he has obtained his relief in respect of the part of the decree, further relief in respect of the remaining part. If it is thought that under the definition clause a final decree is one which completely disposes of the suit and so after a final decree has been passed no further proceeding can be taken in the suit, it may not be correct perhaps to treat a decree made for part of the period as a final decree in that strict sense and only the decree which completes the relief

by granting mesne profits for the further period also might strictly be the final decree. I find it impossible to agree, however, that because there can be one final decree only in that strict sense, there cannot be a decree assessing mesne profits on an enquiry under the terms of Order 20 rule 12, for an intermediate period at first.

4. I have, therefore, come to the conclusion that it is open to the plaintiff to make an application for enquiry under Order 20 Rule 12 as soon as the decree has been made. The contention raised on behalf

f of the respondents that the application was premature must therefore be rejected.

5. Our attention was drawn to a decision of the Patna High Court in *Harakhpan Missir v. Jagdeo Missir*¹, where in considering a question of limitation the view was taken that where a decree awards future mesne profits the right to apply for ascertainment of the amount of the mesne profits does not accrue until the period for which the mesne profits have been awarded has expired. But for the reasons given above I am unable to accept this decision as correct.

6. It appears to me, however, that the learned trial Court was not right in making his own conclusion as regards the mesne profits for the year 1358 on a proportionate basis. It may very well be that the mesne profits for the year 1358 would be more than in previous years or less and as the Commissioner made no report in respect of the year 1358 the conclusion by the learned Judge on a pro rata basis must be held to be illegal surmise rather than legal inference. The present enquiry by the Commissioner having been confined to the period up to 1357, the decree must also be limited to that period. Again, as the suit was instituted in Baisakh p.354 and the Court rejected the claim for compensation and gave a decree only for future mesne profits, the plaintiff is not entitled to any mesne profits for the year 1353. From the figure Rs. 2260-13-0 as calculated by the learned Subordinate Judge we have, therefore, to deduct in the first place the sum of Rs. 213-8-0 and Rs. 131-15-0 which he assessed for the year 1358 in respect of produce of crops and standing fruit bearing trees and the sums assessed by the Commissioner in respect of the year 1353, that is, Rs. 73-2-0. We have also to deduct the sum of Rs. 250 granted by the trial Court in respect of fish taken from the tank, as the finding of the court of appeal that the ditch did not contain "such fish" being a finding of fact is binding on us. The plaintiff is, therefore, entitled to a sum of Rs. 1592.25 np. This relief is given in respect of the period from the institution of the suit till the end of 1357. In respect of the further period he will have to take such steps as he may be advised.

7. I would, therefore, allow the appeal and in modification of the decree passed by the court below direct that a sum of Rs. 1592.25 np. be awarded to the plaintiff on account of mesne profits up to the end of 1357.

8. the appellant will get costs here and below.

U.C. Law, J. :- I agree.

Appeal allowed.