

# CALCUTTA HIGH COURT

Makhan Lal Modak

Vs.

Girish Chandra Jana

Appeal from Appellate Order No. 40 of 1959

(P.N. Mookerjee and Laik, JJ.)

07.12.1961

## JUDGMENT

**P.N. Mookerjee, J.**

1. This Second Appeal is by the defendant and it arises out of a suit for damages and mesne profits. The appeal is directed against an order of remand, passed by the learned Additional District Judge after setting aside the decision of the learned Subordinate Judge, dismissing the suit on the preliminary grounds that it was not maintainable in view of Order XX, rule 12 of the Code of Civil Procedure and that, further it was barred by res judicata. The plea of res judicata was founded on the decision of non-allowance of the present plaintiffs' claim for damages and mesne profits in an earlier suit, which was instituted by them against the present defendants, in respect of the self-same lands, for partition, damages and mesne profits. Under Order XX, rule 12 of the Code, the view, taken by the learned Subordinate Judge, was that a second suit of this description for damages and mesne profits in the context of the previous suit for partition, damages and mesne profits would not be maintainable. The learned Additional District Judge disagreed with the learned Subordinate Judge on both these points and directed a remand for a decision of the suit on the merits in accordance with law after the taking of some further or additional evidence, for which necessary leave was given by him to the parties. It is not necessary for us to state or make reference to any other fact for purposes of this appeal except an incidental reference to the fact that the decree of the trial court on the earlier occasion was silent as to damages and mesne profits and the lower appellate court's decree also on that occasion was merely one of affirmance of the decree of the learned trial Judge. It has been contended before us by Mr. Mullick who appears for the appellant in this case, that, in the first place, the learned Additional District Judge was in error in holding that the present suit would not be barred under the provisions of Or. XX, r. 12 of the Civil Procedure Code. In our view, however, no such bar can apply. Or. XX, r. 12 of the Code is merely an enabling provision, permitting the court, in a suit for recovery of possession, to pass also on the plaintiff's prayer, if he so chooses, a decree for

past and future mesne profits. It is well established that a claim for mesne profits can be separately maintained from a suit for possession and the plaintiff is not obliged to join or unite the two claims. Under the ordinary law, the plaintiff has a right of suit in respect of his claim for damages and mesne profits and, there being no obligation on him to unite it with a suit for possession, Or. XX, r. 12 of the Code would not stand in the way of a separate suit for such claim for damages and mesne profits. Mr. Mullick's contention to the contrary must, accordingly, fail.

2. On the point of *res judicata*, it appears from the record before us that it was given up by the defendant in the court of appeal below but, it being, primarily, a matter of law, there would have been no objection to entertaining and accepting this plea, if it was otherwise good. Mr. Mullick did not urge that the question, in the instant case would be one of actual *res judicata* but he contended that the plaintiffs' present claim would be barred by constructive *res judicata*. Apart from our disinclination to extend the rule of constructive *res judicata* to cases like the present, it is clear that the dismissal of the earlier claim for damages and mesne profits, assuming that the decree, on that occasion, was a decree for dismissal, would really be operative for this purpose only upon the question of mesne profits, prior to the said suit, the cause of action where for must be held to have arisen on that date. Any subsequent claim for mesne profits and/or damages, -and the instant case is one of such subsequent claim, -would not, strictly, fall within the purview of such constructive *res judicata*. Moreover, technically speaking, the instant case was one, where, strictly, the decree was silent as to this claim in the previous suit. In that view, the plea of *res judicata* cannot apply under the Bench decision of this Court in the case of *Kalidas Rakshit v. Keshab Lal Majumdar*<sup>1</sup>, approving the earlier decision by a single Bench of this Court (Mitter, J.) in the case *Bipulbihari Chakravarti v. Nikhilchandra Chakravarti*<sup>2</sup>, on the lines of the Madras and Allahabad decisions and disapproving the Bombay view, reported in *Atmaram Bhaskar Damle v. Parashram Ballal Kelkar & Ors*<sup>3</sup>. On the same principle, again, the rule of *res judicata* also would not apply in respect of the subsequent claim for damages or mesne profits.

3. In our view, therefore, the learned Additional District Judge was right in reversing the dismissal of the plaintiffs' suit by the trial court on the preliminary grounds, noted above, and his decision should be affirmed.

4. We must make it clear, however, that, before us, Mr. Mullick urged the further point that, apart from Or. XX, r. 12 of the Code of Civil Procedure, the present suit would not also be maintainable in view of the fact that the parties are co-sharers and no partition has yet been effected between them, giving them separate possession of the joint lands in suit. This is a point which, although it was raised in the earlier suit and found in favor of the present appellant on that occasion by the learned trial court not considered by the lower appellate court on that occasion and it does not appear to have been considered by any of the two courts below on the instant occasion too. In the circumstances, this point must expressly be left open for consideration at the trial, which will now take place before the trial court on remand. We express no opinion on the merits of this point or objection.

5. Subject as above, this appeal fails and it is dismissed. In the circumstances before us, we direct the parties to bear their own costs in this Court.

6. The appeal having been disposed of as above on the merits and it being pre-eminently a case where an appeal would lie. the alternative application is incompetent, or, at any rate, no order need be passed on the said application.

<sup>1</sup>ILR 58 Cal. 1040

<sup>3</sup>ILR 44 Bom. 954

<sup>2</sup> ILR 57 Cal. 381

**Laik, J**

7. I agree.

Appeal dismissed.