

(namely) one paili per man per mensem from the *Istakbil* (i.e.) the date of the bond, till your grain is repaid (in kind). I am to raise no objection. I, of my own accord and pleasure, and in sound mind, have duly given this bond.

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PER CURIAM (COUCH, C. J., and NEWTON, J.) ;—The Court is of opinion that the document in question requires a stamp of one Rupee, under Article I of Schedule A.

June 15.

Referred Case.

Sitaram Amrut *et al* Plaintiff.
Bhagvant Jaganath *et al* Defendants

Mesne profits—Separate suit—Res Judicata.

When a suit is brought to recover possession of immoveable property and the decree does not provide for the mesne profits that accrued during the suit, a separate suit may be maintained for them. Where, however, it can be shown that the omission in the decree to provide for mesne profits was the deliberate act of the Court, the defendant may set that up as a defence in the separate suit.

Case stated for the opinion of the High Court by Janardan Vasudevji, Judge of Small Causes at Puna, under Sec. 22 of Act XI. of 1865:—

“This suit is one for mesne profits of land sought to be recovered under the following circumstances:—

“The land in question was mortgaged by the plaintiffs’ grandfather to one Gopalrav Deshmukh for, it was alleged, Rs. 21 in 1834-35, and, after the death of the said Gopalrav, the mortgage was assigned by his son, Yashvantrav, to the defendants, with possession of the land. On the 29th of July 1864 the plaintiffs instituted a suit against their mortgagee’s son, Yeshvantrav, and against the present defendants for the recovery of the land in the Court of the Munsif of Puna. Yeshvantrav, however, did not enter an appearance in that suit. Only the present defendants defended it, and the Munsif, having found that Yeshvantrav had mortgaged the land to the present defendants as security for a loan of Rs. 36, and that the defendants had paid Rs. 122-11-3 for assessment due on that land, decreed that, on payment by the plaintiffs to the present defendants of

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those two sums, aggregating Rs. 158-11-3, the latter should deliver up possession of the land to the former. On appeal, however, by the plaintiffs, the District Judge of Puna, on the 26th of February 1867, amended the Munsif's decree by ordering the restoration of the land to the plaintiffs on payment by them of Rs. 21, which they admitted was the debt for which the land had been mortgaged by their ancestor to Gopalrav Deshmukh; and which their mortgagee's son Yeshvantrav did not appear to dispute; and possession of the land was accordingly, on execution being sued out, delivered to the plaintiffs on the 26th June 1867. The plaintiffs now seek to recover from the defendants the mesne profits of the land, alleged to amount to Rs. 135, for three years intervening between the date of their original suit and that on which possession was delivered to them.

"The defendants, *inter alia*, put in the following pleas :—
 (1) that the plaintiffs ought to have, in their suit for thy recovery of the land, asked for the mesne profits which they now seek to recover and that a separate suit will not lie.
 (2) That the plaintiff's mortgagee, Goplrav Deshmukh's son Yeshvantrav, and not the defendants are answerable for any loss of income which the plaintiffs may have sustained by having been kept out of possession of the land.

"With regard to the first of these points I observe a decision of the High Court in the case of *Radhabai v. Radhabai* (a), in which it has been held that mesne profits from the date of suit for the recovery of land till delivery of possession cannot be awarded in the matter of execution, unless the decree provides for them, but that a separate suit will lie for such mesne profits. As to the latter portion of this ruling I have some doubts, which, in deference to the authority and judgment of their Lordships, I crave leave respectfully to submit for their consideration.

"Mesne profits, from the date of suit till delivery of possession, and interest from the date of suit till payment, are placed, by Secs. 196 and 193 of Act VIII. of 1859, in the same category; that is, both are left to the discretion of the

Court adjudicating on the subject matter of the suit. When, therefore, a decree is silent on the point, the natural inference to be drawn is either that the Court making the decree did not, for some reason or other, think fit to award the mesne profits or the interest, as the case may be, or that the point was not urged at the time of trial, and, therefore, not adjudicated upon; in other words, it was an omission which, I should think, can only be rectified by the remedy of a review, and not by that of a separate suit. If mesne profits, which have not been awarded by the decree adjudging possession of the land to which they refer, can be recovered in a separate suit, it must follow that interest, which has not been awarded by a decree for money, may likewise be recovered in a separate suit; but I have not met with any case in which it has been so held. It may be urged that a claim for the recovery of land and a claim for the mesne profits of such land are declared by Sec. 10 of Act VIII. of 1859 to be distinct causes of action, but they are so declared within the meaning of the 8th and 9th sections, which have in view no other object than the convenience of trial, and not within the meaning of the 7th section, which prohibits the splitting up of a cause of action on pain of forfeiture of the portion of claim omitted in the suit brought. A claim for land and a claim for the mesne profits of such land have always been regarded as constituting one cause of action in the same manner as a claim for money and a claim for interest thereon are. * * * *

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The case came on this day before Couch C. J. and Warden J. when the following judgment was delivered by.

Couch, C. J.—In this case the original suit was brought to redeem land which had been mortgaged, and, by the decree of the District Court, the defendants were ordered to restore the land on payment of the principal sum of Rs. 21 only. No allowance was made to the defendants either for interest, on for Rs. 122-11-3 which they had paid for assessment. From this, I think, it must be inferred, either, that by the terms of the mortgage the profits of the land were to be taken instead of interest, or that the Court was of opinion

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that no account should be taken between the parties, and that the mortgagees should not receive interest or account for the mesne profits. If the plaintiffs are to have the mesne profits for the three years between the commencement of the suit and their obtaining possession, they ought to be charged with interest on the Rs. 21 at the agreed rate, and the defendants ought to be allowed for any assessment they have paid. But if, by the terms of the mortgage, the profits were to be taken instead of interest, there was no impropriety in the original decree not directing an account to be taken, or charging the defendants with mesne profits pending the suit. In a case of this description the plaintiff is precluded by the decree from bringing a separate suit for mesne profits; and if he ought to have had them, he should have applied for a review of the decree. On this ground, then, I am of opinion that the present suit cannot be maintained.

But as the Judge of the Small Cause Court has raised the question whether a separate suit for mesne profits can be brought in any case, and has submitted to us his reasons for his opinion that it cannot, I think it is better that we should now determine that question. He relies upon Sec. 7 of Act VIII. of 1959, considering that "ordinarily a claim for land and a claim for the mesne profits of such land constitute one cause of action," and that, if the mesne profits are not claimed in the original suit, the right to them is lost. Now, in a suit for the recovery of land, the cause of action is the wrongful possession by the defendant of the plaintiff's land at the time of bringing the suit; that being established, the plaintiff is entitled to recover the land, and it is immaterial when the defendant took possession, and whether he did so wrongfully, or, having been in possession rightfully his right to it has ceased. But in a suit for mesne profits the cause of action is the dispossession of the plaintiff, and the keeping him out of possession, and the receipt by the defendant of the profits of the land during the period for which the mesne profits are claimed. This is a different cause of action from the other, and the practice of regarding them as constituting one cause of action alluded to by the Judge

of the Small Cause Court was an erroneous one. As to interest, in some cases a claim to it may be a separate cause of action from the claim to the principal sum; as where there is a contract to pay interest at stated periods before the principal sum becomes due. It is probable that Sec. 10 was inserted in Act VIII. of 1859 in consequence of the then existing practice, and to prevent any doubts being raised. Its not referring to Sec. 7 cannot make a claim for land and a claim for mesne profits one cause of action, if in fact they are not so; and their being so is inconsistent with Sec. 11 of Act XXIII. of 1861. If they were, no separate suit could ever be maintained for mesne profits, it being absolutely prohibited by Sec. 7 of Act VIII. of 1859, and the prohibition in sec. 11 in the cases coming within that section is unmeaning. Hitherto, wherever it has been held that a separate suit for mesne profits could not be maintained, the decision of the Court has been founded upon Act XXIII. of 1861. It has never, as far as I am aware, been thought that Sec. 7 of Act VIII. was applicable. Where the claim for land and the claim for mesne profits are joined in the same suit, it was still necessary to give the Court power to provide for mesne profits until the delivery of possession, as these could not properly be claimed in the plaint, the cause of action, namely, the plaintiff being kept out of possession during the suit, arising after the suit was instituted. Sec. 196 of Act VIII. of 1859, therefore, provides for this, as Sec. 10 of Act XXIII. of 1861 does for interest; but it is not imperative on the Court; and the High Court at Calcutta has held in *Haramohini Chowdhraïn v. Dhanmani Chowdhraïn* (b) that where the decree has not provided for the mesne profits during the suit a separate suit may be maintained for them. I concur in that opinion, though not without having had some doubt; as it might be that the omission to provide for the mesne profits was the deliberate act of the Court, which considered that under the circumstances of the case they ought not to be allowed. Whenever this can be shown, the defendant ought to be allowed to set it up as a defence in the separate suit.

Warden J., concurred.

(b) 1 Bengal L. Rep. App. Civ. 133.

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