

Present : Pereira J.

1913.

CATHERINA *et al.* v. ALLIS *et al.*

171—C. R. Galle, 7,304.

Action rei vindicatio—Prospective mesne profits claimed—Claim disallowed—Subsequent action does not lie—Res judicata—Civil Procedure Code, s. 196.

Where in an action *rei vindicatio* prospective mesne profits are claimed by the plaintiff, and the claim is disallowed, the order, in spite of the provision of section 196 of the Civil Procedure Code, operates as *res judicata* between the parties, and no fresh action can be brought for the recovery of the same mesne profits. Section 196 does not vest in the Court a discretion as to allowing or disallowing future mesne profits, but the discretion vested is merely a discretion as to assessing beforehand the anticipated loss, and giving judgment accordingly.

THE facts appear from the judgment.

H. A. Jayewardene and Arulanandam, for plaintiffs, appellants.

A. St. V. Jayewardene, for respondents.

Cur. adv. vult.

July 1, 1913. PEREIRA J.—

The plaintiffs, claiming a certain share of the land called Leanaduragewatta, complain that the defendants are in unlawful possession of the share, and pray that they be condemned to pay the plaintiffs damage at Rs. 150 a year from January 25, 1912, until the plaintiffs are restored to possession. The defendants deny the possession complained of. The main issue framed is whether the defendants prevented the plaintiffs from taking the produce of their share of the land. On the evidence led the Commissioner has decided this issue against the plaintiffs, and dismissed their claim. In this appeal it is not open to the plaintiffs to contest the Commissioner's finding on the facts, as no question of title to immovable property is involved in the case. But it appears that some at least of the plaintiffs had brought action No. 6,793 of the Court of Requests of Galle against these defendants to be declared entitled to the share of land that they claim in this case; and in that case, although they claimed mesne profits as well until they regained possession, they were not allowed their prayer, and it is now argued by the defendants that the judgment in that case is *res judicata* in respect of the plaintiffs' present claim for damage. It is indeed unnecessary to go into this question in view of the Commissioner's decision on the facts, but as the question was

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argued at some length, I shall express my own view of it. The argument is that mesne profits are allowed by our Courts under section 196 of the Civil Procedure Code, and as that section vests a discretion in the Court on the question of allowing mesne profits, the express or tacit disallowance by the Court of mesne profits accruing after action does not bar a second action therefor. In support of this contention decisions of some of the Indian Courts were cited. In *Mon Mohan Sirkar v. The Secretary of State for India* ¹ it was held that in a suit for recovery of possession and mesne profits the Court had power under section 211 of the Civil Procedure Code (same as section 196 of the Ceylon Code) to award mesne profits either up to the date of the institution of the suit or up to the date of delivery of possession, and that when a decree for possession was silent as regards mesne profits which had accrued between the date of the institution of the suit and delivery of possession, a separate suit would lie for such subsequent mesne profits. Ameer Ali J., in the course of his judgment, observed: "It does not follow that because plaintiff prayed for assessment of damages until he was restored to his property, and the Court in its discretion was satisfied with decreeing his claim for damages so far as they had accrued due, his claim for damages for trespass continued after suit would be barred by the rule of *res judicata*." In *Kuppasamy Aiyer v. Venkataramier* ² it was held that the granting of future mesne profits which the Court had a discretion in any event either to make or to refuse was not relief that the plaintiff was entitled to as of right, and that future mesne profits accruing after the institution of the suit did not form part of the cause of action, and that it could not be claimed as of right, and could not, but for section 211, be asked for at all, and might in any case be refused by the Court at discretion. The same position, it will be seen, is laid down in the case of *Hays v. Padmanand Singh* ³ but a contrary view would appear to have been taken by the High Court at Madras in *Ramabhadra v. Jaganatha*. ⁴ This last case, I may mention, was not followed by the same High Court in the case of *Kuppasamy Aiyer v. Venkataramier* ² that I have cited above. The view taken by this Court so far has been that taken by the High Court at Madras in *Ramabhadra v. Jaganatha*. ⁴ In *Kiri Hamy v. Dingiri Anma* ⁵ Layard C.J. observed: "Every right to damages which has been put in issue between the parties to an action becomes on the passing of the final decree in the action a *res judicata*, which cannot afterwards be made the subject of an action between the same parties. The right to damages has been claimed and put in issue here in the prior action, and consequently cannot be made the subject of a fresh action in the present suit."

¹ I. L. R. 17 Cal. 968.

² 15 Mad. L. J. R. 462.

³ I. L. R. 32 Cal. 118.

⁴ I. L. R. 14 Mad. 328.

⁵ 1 Bal 146.

In *Kiri Banda v. Slema Lebbe* ¹ my brother Wood Renton agreed with Layard C.J. in the opinion expressed by him in *Kiri Hamy v. Dingiri Amma*.² My own view, I may say, is the same. Mesne profits are in the nature of prospective damages, and the right to claim prospective damages accrues from the same cause of action—the same act or omission of the defendant—from which compensation for ascertained loss is usually claimed. (See *The Laws of England*, vol. X., p. 306, and the cases collated there.) This is made quite clear by section 35 (1) (a) of our Code of Civil Procedure. If, then, mesne profits may be claimed as a matter of right, as accruing from a certain cause of action, I fail to see why an adjudication on a claim for such profits should not operate as an estoppel. Section 196 of the Civil Procedure Code does no more than empower the Court to decree the payment of a certain sum or certain sums of money in lieu of mesne profits where they are claimed; that is to say, the Court is vested with the power of assessing beforehand the anticipated loss, and giving judgment accordingly.

I affirm the judgment appealed from.

Affirmed.

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PERHRA J.

*Cathrina v.
Allis*