MANU/BH/0037/1925

Equivalent Citation: AIR1926Pat218, (1926) ILR 5 PAT 361, 93Ind. Cas.939, 93Ind. Cas.939

IN THE HIGH COURT OF PATNA
FULL BENCH

Decided On: 22.12.1925

Appellants: **Ram Golam Sahu and Ors.**
Vs.
Respondent: **Chintaman Singh**

Hon'ble Judges/Coram:
Thomas Fredrick Dawson Miller , C.J., B.K. Mullick , Jwala Prasad , Das and Foster , JJ.

JUDGMENT

Thomas Fredrick Dawson Miller, C.J.

1. This is an application in revision asking us to set aside ah order of the Subordinate Judge of Bhagalpur, dated the 9th September 1924, restoring to his file a petition for ascertainment of mesne profits which had previously been dismissed for non-payment of the Court-fee. The plaintiff, who is the opposite party in the present application, sued the defendants, who are the present petitioners, for possession of certain lands together with mesne profits up to the institution of the Suit. The mesne profits were valued in the plaint at Rs. 10,000 and covered the period of three years before the institution of the suit. The Court-fee amounting to Rs. 505 was paid, in respect thereof when the plaint was filed. The plaintiff also claimed an enquiry as to future mesne profits for the period between the institution of the suit and delivery of possession. In 1919, after failing in the Trial Court, he obtained a decree in the High Court for possession, together with mesne profits, and by the decree it was ordered that mesne profits should be ascertained in execution. That decree was subsequently affirmed by an order of the Privy Council on the 9th June 1921. The plaintiff subsequently applied for possession of the property and finally obtained it on the 23rd June 1922, and under his decree he would be entitled to mesne profits up to that date. On the 7th June 1924 he presented an application to the Subordinate Judge for ascertainment of the amount of mesne profits up to the date of delivery of possession in June 1922. The amount estimated in his application included the sum of Rs. 10,000 as the mesne profits for the three years preceding the institution of the suit upon which sum, as stated, the Court-fee had already been paid. The value of the subsequent niqsne profits payable up to the date of delivery of possession was estimated in the application at Rs. 1,36,000. The Subordinate Judge ordered that the Court-fee payable upon this amount should be deposited before proceeding with the enquiry. A date was fixed for payment which was subsequently extended up to the 29th August 1924. The Court-fee was not paid by that date, and on the 30th August the Subordinate Judge ordered that the application should be dismissed for default. On the 9th September the plaintiff applied for restoration of the application for ascertainment of mesne profits and offered to pay the Court-fee. The application was heard on the 13th September when the Subordinate Judge granted the application, restored the case to his file and directed the Court-fee to be deposited which was done the same day.

2. The Subordinate Judge purported to act under Order IX, Rule 4 of the C. P.C. The judgment-debtors then applied to this Court in its revisional jurisdiction to set aside the order of the 13th September. The application was heard by a Division Bench consisting of Mr. Justice Das and Mr. Justice Ross. The learned Judges were of opinion that the case could not be restored under Order IX, Rule 4 which provides for restoration only under certain conditions which did not exist in the present case. They refused, however, to interfere under the revisional jurisdiction of the Court on the ground that the previous order of the 30th August dismissing the application for ascertainment of mesne profits for-default in payment of the Court-fee was itself without jurisdiction. If they were right on that point, then I agree with the view expressed by the learned Judges that the powers of revision should not be exercised in such a case, for by so doing the Court would be giving effect to mere' technicalities of procedure at the expense of manifest justice. There are, however, two decisions of this Court which the learned Judges considered were in conflict with their opinion, as to the liability to pay Court-fees for future mesne profits as a condition precedent to their ascertainment. The case was accordingly referred to a Full Bench for determination.

3. The plaintiff has contended, first, that no Court-fee is leviable at all in respect of future mesne profits, that is, for the period; between the institution of the suit and the date of possession, and secondly, that, even if leviable the fee cannot be exacted before the amount of such profits has been ascertained as directed by the decree, and that the Court has no jurisdiction to exact payment as a condition precedent to the ascertainment of the profits or to dismiss an application on the ground of non-payment of such fee at that stage.

4. The determination of these questions depends upon the interpretation of certain sections in the Court Fees Act and in the C. P.C. Section 7(1) of the Court Fees Act provides that the amount of fee pay able in suits for money (which would include the present claim) shall be computed according to the amount claimed and by Order VII, Rule 2 of the C. P.C. where the plaintiff seeks the recovery of money the plaint shall state the precise amount claimed: but where the plaintiff sues for mesne profits the plaint shall state approximately the amount sued for. When the suit was instituted in 1914 the only mesne profits that could be estimated were those which had already accrued due and these were estimated, as already stated, and the proper Court-fee was paid thereon with the plaint. No cause of action had arisen at that time with regard to future mesne profits, for no amount was due and no estimate could be made with respect to a future claim which might or might not arise. The C. P. C, however, provides by Order XX, Rule 12 that where a suit is for the recovery of possession of Immovable property and for rent or mesne profits the Court, in addition to granting a decree for possession and mesne profits up to the institution of the suit, may also direct an enquiry as to the mesne profits from the institution of the suit until either delivery of possession to the decree-holder, or relinquishment of possession by the judgment-debtor, or the expiration of three years from the date of the decree, winch-ever event first occurs. This provision was no doubt inserted in the Code in order to prevent multiplicity of suits, as without it a further suit would be necessary in order to recover the rents and profits for the period during which the decree-holder was kept out of possession after the suit. The relief provided by this enactment is not an immediate right to any ascertained amount, or to any amount which is capable of being estimated, but a right to an enquiry only, in case the plaintiff should be kept out of possession after the institution of the suit, and no special Court-fee appears to be provided for such relief. Where such an enquiry is directed by the Court then Order XX, Rule 12 (2) provides that a final decree in

respect of the rent or mesne profits shall be passed in accordance with the result of such enquiry.

5. Under the Code of 1882, as under the present Code of 1908, the Court could either determine at the trial the amount of mesne profits due before institution and pass a decree for such amount, or it could order an enquiry, whilst with regard to future mesne profits it could only order an enquiry. In this respect there is no difference between the two Codes, but by Section 244 of the old Code questions regarding the amount of any mesne profits as to which the decree had directed an enquiry were to be determined by the Execution Court, whilst under the present Code of 1908 there is no such provision and the enquiry may take place either before the Trial Court itself, or in such manner as it: may direct, and a final decree must then it be passed in accordance with the result of* the enquiry. Under the old law when the Executing Court held the enquiry no Court fee was ever paid or exacted, so far as I am aware, as a condition precedent to the holding of an enquiry as to future mesne profits, but Section 11 of the Court Fees Act provides as follows:

> **11.** In suits for mesne profits or for Immovable property and mesne profits, or for an account, if the profits or amount decreed, are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed, shall have been paid to the proper officer.
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> Where the amount of mesne profits in left to be. ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.

6. The section contemplates two cases in which provision is made for exacting an additional Court-fee after the profits have been ascertained. The first paragraph would appear to relate to a case where the profits claimed before institution of the suit had been ascertained in the Trial Court and provides for payment of a fee 1 upon the excess amount found due, Tinder penalty of having the execution stayed if the fee is not paid. The second paragraph appears to apply to all cases of past or future mesne profits which have been ascertained in execution and provides for payment of a Court-fee upon the excess of the profits so ascertained over and above the amount claimed and paid for in the plaint and the fee payable is the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits eventually ascertained. In such case the Court may fix a time within which the Additional-fee should be paid and may dismiss the suit for default of payment. As in the present case, the mesne profits, past and future, were directed to be ascertained in execution, it would appear that the second paragraph of Section 11 applies. It is clear, to my mind, from this section that the fee payable is not the fee upon an estimated amount stated in the petition, but upon excess of the amount actually found due by the enquiry over and above the amount upon which the fee has already been paid. From this it would follow, and indeed the language of the section seems clear enough, that no excess fee can be claimed until the actual amount due has been ascertained. In other words, the fee payable is not calculated by reference

to the amount estimated in the petition but by reference to the amount actually ascertained on enquiry.

7. It was contended, however, that the application for ascertaining future mesne profits should be treated as either a supplementary or amended plaint, and viewed from this aspect the Court-fee on the amount estimated in the application should be paid on the presentation of the application as if it were a plaint. This argument would no doubt be entitled to consideration if it were put forward in support of what the law ought to be, but I can find nothing either in the C. P.C., or in the Court Fees Act, which enacts that an application to hold an enquiry directed by the decree and to which the decree-holder is already entitled under his decree, should be treated as a plaint, and I agree with the view expressed by the learned Judges of the Division Bench in the order of reference that the Subordinate Judge in dismissing the application for ascertainment of mesne profits on the 30th August was exceeding his jurisdiction.

8. I wish to add a word about the case of Nand Kumar Singh v. Bilas Ram Marwari 40 Ind. Cas. 579 : P.L.J. 67 : 1 P.L.W. 781. which was relied on as expressing a contrary view. The question in that case was whether the fee payable was an ad valorem fee or a fee. calculated on some other basis, and the question arose in respect to the fee payable, not on a plaint, but on a memorandum of appeal. The appeal was by the plaintiff as decree-holder against an order of the Executing Court deciding that mesne profits were payable from the date of the decree of the Privy Council and not from the date of the original decree of the Trial Court which had decreed possession and directed that mesne profits should be ascertained in execution, and which had been affirmed by the Privy Council. The judgment-debtors raised, amongst other points, a preliminary objection, that the fee paid on the memorandum of appeal was insufficient and that it ought to have been an ad valorem tee on the value of the appeal calculated on the difference between the total estimated profits claimed and the estimated profits for the period allowed. The Court decided that the fee payable on the memorandum of appeal was an ad valorem fee and should be calculated on the value of the appeal estimated at the amount of the profits claimed for the period disallowed under the order appealed from. That question does not arise in the present case and it is not necessary now to express an opinion on the correctness of the decision. The ground upon which it is based may possibly be in conflict with the view I have already expressed upon the present case, but I prefer to reserve my judgment upon the correctness of the decision itself until the matter directly arises for consideration.

9. The subsequent case of Ram Bilas Singh v. Amir Singh 55 Ind. Cas. 24. decided in 1918 by a Division Bench, of which I was a member, followed the decision in Nand Kumar Singh's case 40 Ind. Cas. 579 : 3 P.L.J. 67 : 1 P. L. W. 781. to the extent that the fee payable on the memorandum of appeal was an ad valorem fee, but in neither of those cases does it appear to have been argued that the excess fee could only be exacted after ascertainment of mesne profits and when the excess amount had been definitely determined.

10. There is some authority for the proposition that no Court-fee can be exacted at any time in respect of future mesne profits even after ascertainment. See Earn Krishna Bhikaji v. Bhimabai 15 B. 416 : 8 Ind. Dec. (N.S.) 283. This view, however, has not found favour in the Calcutta High Court, In Dwarka Nath Biswas v. Debendra Nath Tagore 33 C. 1232. it was held by Rampini and Harington, JJ., that where past and future mesne profits had been claimed and a Court-fee had been paid with a

plaint on the estimated mesne profits up to the date of suit and both classes had been subsequently ascertained in execution, Section 11 of the, Court Fees Act applied and the Court-fee on the future mesne profits so ascertained could be demanded on pain of having the suit dismissed if not paid within the time fixed. In my opinion the Calcutta view is right and under Section 11 of the Court Fees Act a fee is claimable upon future mesne profits after ascertainment.

11. If I am right in the view already expressed, it follows that a Court-fee is payable on future mesne profits but it can only be exacted after the amount has been ascertained by enquiry, and the Court has no jurisdiction to dismiss an application for enquiry for non-payment of Court-fee in advance.

12. I consider that we should in the particular circumstances of this case and in the ends of justice refuse to exercise our powers of revision even though technically the order complained of, dated the 13th September, may have been wrong, By setting aside the order complained of we should be depriving the plaintiff of the right which was improperly withheld from him by the previous order and be perpetrating an injustice for the sake of a technicality of procedure which has nothing to commend it, The application is dismissed but in the circumstances we think that each party should bear his own costs.

B.K. Mullick, J.

13. I agree with the learned Chief Justice. By reason of the special provisions of Order VII, Rule 2 and Order XX, Rule 12 of the C. P.C. a plaintiff may in a suit for recovery of possession of Immovable property also claim (a) mesne profits which have accrued on the property prior to the institution of the suit or (6) an inquiry as to such mesne profits or (c) an inquiry as to mesne profits from the institution of the suit until delivery of possession to the decree-holder or 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. The Code of 1882 required that an inquiry into mesne profits should be made in execution but the Code of 1908 has effected a change and now all such inquiries must be made in the suit itself and there must be a final decree setting the amount due. The decree directing that the plaintiff be" put in possession is final. So also is a decree for a specific sum on account, of mesne profits which have accrued due prior to the institution of the suit. If, however, the Court considers it necessary to direct; an inquiry then the order for such inquiry : is always a preliminary decree. With regard, to the mesne profits which have accrued due subsequent to the institution of the suit, the Court cannot make any order except an order for inquiry and that must always be a preliminary decree. The Code does not prescribe any special form in which the: application is to be made for holding the inquiry nor is it necessary to consider here what is the period of limitation for making such an application. One view is that there can be no period of limitation as it is the duty of the Court to carry out that which? is ordered by its preliminary decree. See Puran Chand v. Roy Radha Kishen 19 C. 132 : 9 Ind. Dec. (N.S.) 534. That question, however, does not arise in the present case; the only question we have to consider here is whether the applicant when he applies for the inquiry which the Court has ordered, should put any, and if so, what valuation upon his application. Now Order VII, Rule 2 requires that some estimate should be made in the plaint in respect of mesne profits. It may be contended that this refers only to mesne profits which have accrued before the institution of the suit and that it cannot refer to mesne profits which have accrued since the institution of the suit for which the cause of action has not yet arisen. In my opinion the answer is that for the

protection of the revenue the law compels the plaintiff to make a valuation of some kind. If he claims mesne profits both in respect of the period antecedent to the suit and also the period subsequent thereto, the valuation will be held to refer to both periods. If he sues for mesne profits in respect of only one of these two periods, the valuation will be held to refer to that period only. The provision is not based on any logic, it is purely fiscal and arbitrary and compels the plaintiff to make an estimate even though he may have no materials for doing so. When the Court by its final decree has determined the total amount of mesne profits due in respect of both or either of the periods as the case may be an application must be made in the form prescribed for the execution of decrees in the Execution Department; and Section 11 of the Court Fees Act then comes into play and empowers the Execution Court to stay the execution of the decree till the Court fee on the difference, if any, between the valuation contained in the plaint and the amount ascertained in the final decree has been paid.

14. But there may be cases where a decree has been passed under the old Code directing that the inquiry into mesne profits be made in the Execution Department. Such is the decree in the case now before us and it becomes the duty of the Execution" Court to make the inquiry. In such a case the latter part of Section 11 of the Court Fees Act operates to protect the revenue. This part of Section 11 of the Court Fees Act requires that the execution of the decree shall be stayed until the additional fee, it any, be paid within the time fixed by the Court and that in default the suit shall be dismissed. But the Court cannot demand that the Court-fee or any portion of it shall be paid before it has completed its inquiry.

15. Nor does the argument, which I think must be accepted, that since the present C. P.C. came into force there can be no application in execution for holding an inquiry to ascertain the amount of mesne profits and that all such applications must be regarded as applications in the suit, affect the matter. The decree-holder is not liable to make with his application any deposit of Court-fee as a condition precedent to the inquiry. The deficit Court-fee, if any, can only be demanded from him under Section 11 of the Court Fees Act after the decree has been put in execution.

16. The fact is that the application to the Court to ascertain the mesne profits after a preliminary decree has been made is not in any sense a plaint and there is no Statute for the levy of ad valorem fee on it. The object of leaving ad valorem Court-fees on claims for money is to secure revenue; it has no reference to the labour expended by the Court upon the adjudication of the claim and the decree-holder is entitled to demand that the Taxing Statute must be strictly construed.

17. Therefore there being no provision for taxing an application for inquiry' whether in the suit or in execution the Subordinate Judge was wrong in dismissing the application.

18. Finally there was nothing in Nand Kumar Singh, v. Bilas Ram Marwari 40 Ind. Cas. 579 : P.L.J. 67 : 1 P.L.W. 781. to justify his order. I have examined the record- of that case and find that the suit was for recovery of possession of land and for mesne profits from the date of dispossession to that of recovery of possession, but the decree awarded mesne profits only from the date of the decree to that of recovery of possession. In the course of execution a dispute arose as to whether the date of the decree was the date of the Trial Court's decree or the date of the decree subsequently made by the Privy Council and an appeal was preferred to the High Court on this point. The High Court held that before the memorandum of appeal could

be entertained the appellant must first pay ad valorem Court-fee on the value o| the appeal which was the amount of mesne profits which he hoped to recover if the appeal was decreed in his. favour. The Court also held that as in the Trial Court the plaintiff had omitted to estimate the value of the mesne profits claimed he must amend the plaint and pay deficit Court-fees thereon. There was nothing in the order of the High Court to suggest that the Court required the decree-holder to pay in the Execution Court any ad valorem Court-fee as a condition precedent to the holding of the inquiry.

19. I agree, therefore, that neither Nand Kumar Singh's case 40 Ind. Cas. 579 : P.L.J. 67 : 1 P. L. W. 781. nor Bam Bilas Singh v. Amir Singh 55 Ind. Cas. 24. which follows it affects the decision of the case now before us.

Jwala Prasad, J.

20. The questions referred to by the Division Bench of this Court for decision to the Full Bench are:

> (1). Is any Court-fee payable in respect of claim for future mesne profits, that is to say, mesne profits from the date of the institution of the suit up to the date of the realization?
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> (2) Has the Court any jurisdiction to require the plaintiff to pay additional Court-lee upon his claim for future mesne profits as, a condition for proceeding with the investigation of the claim, and has it any jurisdiction to dismiss the proceedings if the additional Court-fee is not paid?

21. The circumstances under which the reference has been made are as follows:

22. On the 14th September 1914, the plaintiff-opposite party brought an action in the Court of the Subordinate Judge of Bhagalpur for a declaration of title to and recovery of possession of certain properties described in the plaint. He claimed mesne profits up to the date of the suit and from that date up to the date of his recovering possession of the property. He assessed the mesne profits payable to him, on the date of the institution of the suit, at Rs. 10,000 and paid Rs. 505 as Court-fee payable upon that sum. In regard to the future mesne profits, he asked for a determination either during the pendency of the suit or in the execution proceedings and offered to pay the Court-fee on the mesne profits that would be ultimately determined.

23. The Subordinate Judge dismissed the plaintiff's suit; but on appeal by the plaintiff the High Court, on the 30th June 1919, decreed the suit directing that " mesne profits shall be ascertained in execution." The decree of the High Court was affirmed by the Judicial Committee on the 9th June 1921. The plaintiff executed the decree and obtained possession of the property on the 23rd January 1920. On the 7th of June 1924, the plaintiff made an application to the Subordinate Judge of Bhagalpur for the ascertainment of mesne profits and named a very large sum of money which, he aid, would be found due to him on such ascertainment.

24. The ad valorem Court-fee, calculated upon the amount of mesne profits stated by the plaintiff in his application, came to Rs. 2,421-12-0. On the 21st July 1924, the learned Subordinate Judge passed an order on the back of the plaintiff's petition directing the plaintiff to pay the said sum of Rs. 2,421-12-0 as a condition for entering his application for the ascertainment of mesne profits fixing a definite time

under which it was to be paid. The Court extended the time for payment of money from time to time and ultimately dismissed the application for the ascertainment of mesne profits on the 30th August 1924 on account of failure on the part of the plaintiff to pay the Court-fee. On the 9th September 1924, the plaintiff applied for restoration of the proceedings and the learned Subordinate Judge restored the proceedings under Order IX, Rule 4 of the C. P.C. That order was recorded in Miscellaneous Case No. 168 of 1924 and runs as follows:

> Application under Order IX, Rule 4, C. P.C., filed. Register. An application was filed for ascertainment of mesne profits in this case. The applicant failed to pay in the Court-fee inspite of repeated orders. Applicant's Pleader moves me that it is great hardship on the party that the application has been rejected and that he is ready to pay Court-fee. A question of limitation also arises as the Pleader argues. If any part becomes barred it would really cause, much hardship to the applicant. The application may be restored to file if applicant readily pays the Court-fee. Let the application be restored to file on applicant's filing Court-fee by the 13th September without fail.

25. In accordance with the directions the plaintiff paid Court-fee on the 13th September and the Court recorded the following order:

> Court-fee filed. Case restored. Let mesne profits be ascertained," and proceeded to ascertain the mesne profits payable to the plaintiff.

26. The judgment-debtor has come to this Court in revision and contends that the order of the Subordinate Judge dated the 9th September 1924 restoring the application of the plaintiff-decree-holder for ascertainment of mesne profits, which was already dismissed on' account of non-payment of Court-fee, is bad inasmuch as Order IX, Rule 4 has absolutely no application. He further contends that the order of the Subordinate Judge dismissing the application could not be set aside except upon a review to that Court or in an appeal to this Court. This contention assumes that, the plaintiff had a right of a review of or an appeal from the order of the 30th August 1924 dismissing his application for ascertainment of mesne profits. It is obvious that the order of the 30th August was not capable of review. The right of review is given by Order XLVII of the C. P.C. and can only be exercised within the limitation prescribed by Rule 1 of that Order and is dependent upon a discovery of a new matter or evidence which after the exercise of due diligence was not within the knowledge of or could not be produced by the plaintiff at the time when the decree or order was made or on account of some mistake or error apparent on the face of the record or for any other sufficient cause. The grounds enumerated in that rule, upon which the review is permissible, do not exist in this case and the words "any other sufficient cause" have been held to refer to causes which are ejusdem generis with those specifically mentioned in the rule. Therefore the order of the Subordinate Judge of the 30th August was not capable of review.

27. There cannot be any appeal from that order inasmuch as it was not a decree within the meaning of the word as defined in Rule 2, Clause (2). The learned Advocate on behalf of the applicant relies upon the last part of Clause (2) which says that "the decree shall be deemed to include the rejection of plaint." This assumes that the application of the plaintiff for the ascertainment of mesne profits was a plaint. This is wholly an untenable position. The plaintiff's application can, in no sense, be said to be a plaint. The plaintiff had already filed his plaint when he instituted the suit which ultimately resulted in a decree in his favour for possession and mesne

profits. That plaint was presented under Order IV, read with Order VI and VII, and Section 26 of the Code. The application for ascertainment of mesne profits was filed either by way of an execution of the decree based upon the plaint already filed by him, or for an enquiry under Order XX, Rule 12 of the Code in pursuance of the preliminary decree which was passed on the foot of his plaint. Such an application cannot be said to be a plaint The learned Advocate has invented a felicitous expression and calls the application a supplementary plaint. But there is no provision in the Code for presenting a supplementary plaint. Even applications for amendment of plaints or addition of parties or reliefs do not count as plaints. It is not necessary to pursue the point further inasmuch as the learned Advocate, towards the close of his argument, admitted that it was not a supplementary plaint and pointed out to us the latest decision of the Calcutta High Court in the case of Bidyadhar Backer v. Manindra Nath Das MANU/WB/0098/1925 : 89. Ind. Cas. 726 : 29 C.W.N. 869 : 42 C.L.J. 19 : A.I.R. 1925 Cal. 1076. wherein it has been clearly held that such an application is not a plaint. Therefore the rejection of the plaintiff's application cannot stand on the same footing as the rejection of a plaint under ORDER VII, Rule 11 (c) on account of the failure of the plaintiff to supply the requisite stamp-paper within the time fixed by the Court and the order rejecting the application is not a decree within the meaning of Section 2(2) of the C. P.C. and hence there is no appeal from this order. In refusing the application the Court refused to exercise jurisdiction and this Court can, in revision, direct the lower Court to entertain the application and proceed according to law. The lower Court also can sue mote disregard its order refusing the application as ultra vires.

28. The next question is, could the Court dismiss the application on the ground that it was not properly stamped. Section 6 of the Court Fees Act prohibits acceptance of a document chargeable in the First or Second Schedule of the Act unless in respect of such a document there be paid a fee of an amount not less than that indicated by either of the said Schedules as the proper fee for such document. The Schedules do not require a petition for the ascertainment of mesne profits to bear an ad valorem Courts-fee and the application was properly stamped with a Court-fee of 12 annas prescribed in Schedule II of the Court Fees Act for all applications to the Subordinate Courts. Therefore the application could not be dismissed upon the ground that it did not bear proper Court-fee. The learned Subordinate Judge had no jurisdiction to reject the plaint originally filed upon the ground that it did not bear proper Court-fee. The plaintiff claimed past mesne profits, which, according to him, approximately amounted to Es. 10,000 as required under Order VII, Rule 2 of the C. P.C. and paid a Court fee thereon under Section 7, Clause (iv) (f) of the Court Fees Act. He also prayed for determination of his right to future mesne profits. The amount of future mesne profits was not ascertainable at that time on account of the uncertainty of time during which the plaintiff, would be out of possession as well as the uncertainty of the profits which the defendant would be expected to reasonably earn from the lands approximately. To take an extreme case, the land might be submerged by water-and remain so after the institution of the suit till the plaintiff recovered possession of the property and in that case there would be no profit earned by the defendant which could be claimed as mesne profits by the plaintiff. Therefore to ask the plaintiff to state in his plaint the "approximate amount of mesne profits" would be to ask him to value his relief upon an imaginary figure. This position is so absurd that the Legislature has not thought it fit to compel the plaintiff to value the future mesne profits or to pay any Court-fee thereon at the time of filing the plaint. Neither Order VII, Rule 2 of the C. P.C. nor Section 7, Clause (iv) (f) of the Court-Fees Act would apply to Unascertained 'future mesne profits. No Court-fee is payable upon future mesne profits until after the amount is already ascertained.

29. It is only to avoid multiplicity of suits that the plaintiff in a suit for possession is entitled to ask in his plaint not only for the past profits which had accrued at the date of the institution of the suit but also future mesne profits from the date of the suit up to the date of delivery of possession to him and when the plaintiff claims mesne profits, past and future, the Court may in the same suit, while decreeing the suit for possession, determine the amount of mesne profits. The present C. P.C. 1908, lays down the procedure for determining the mesne profits in Order XX, Rule 12. Under Section 196 of the C. P.C. (Act VIII of 1859), the Court could provide in the decree for the payment of mesne profits from the date of the suit until the date of delivery of possession to the decree-holder. Section 197 provides that the Court could determine the amount prior to the passing of a decree for land or pass a decree for the land reserving an enquiry into the amount of mesne profits in the Execution of the decree according as it appeared most convenient. Similar were the provisions made in the later Code (Act XIV of 1882) in Sections 211 and 212 with this difference that under the latter section the enquiry into and determination of the mesne profits to be incorporated and named in the decree for possession was limited to the period prior to the "institution of the suit" whereas in Act VIII of 1859 it was up to the "passing of the decree for the land." But in these Acts there was no specific provision for the determination by the Trial Court and incorporation in the decree the amount of mesne profits from the date of the institution of the suit or decree up to the date of the delivery of possession. This, therefore, used to be done under the old Acts in execution proceedings and as pointed out by this Court in Harakhpan Misir v. Jagdeo Misir MANU/BH/0286/1924 : 84 Ind. Cas. 272 : 4 Pas. 57(1024) Pat. 265 : 5 P.L.T. 626 : 3 Pat. L.R. 32 much divergence of opinion prevailed as to whether an application for ascertainment of future mesne profits in the execution proceedings was governed by the three years' rule of limitation; vide Gangadhar Manika v. Balkrishna Soiroba Kasbekar 61 Ind. Cas. 448 : 45 B. 819 : 23 Bom. L.R. 263. Ramana Reddi v. Babu Reddi 18 Ind. Cas. 586 : 37 M. 186, 13 M.L.T. 79 : (1913) M.W.N. 114 : 24 M.L.J.96. and Buran Chand v. Roy Radha Kishen 19 C. 132 : 9 Ind. Dec. (N.S.) 534. The present Code has made it clear that the Court which passes a decree for possession of the land may direct an enquiry as to the mesne profits both prior to the institution of the suit and subsequent thereto up to the delivery of possession or up to three years whichever date is earlier. No Court-fee used to be paid when the old Codes were in force before the future mesne profits were determined whether they were determined in the execution proceedings or in proceedings in continuation of the suit. The present Code in providing for the enquiry as to mesne profits by the Court passing a decree for possession of land does not purport, in any way, to affect the law as to the time when the Court-fee is payable with respect to future mesne profits. It has, simply amalgamated the provisions of the old Codes spread in several sections and has clearly defined the power of the Court passing a decree with respect to the holding of an enquiry and ascertaining the mesne profits which was somewhat vague and doubtful in the old Acts. The Court Fees Act (VII of 1870) remains unaltered and the change in the Procedure Code as to the mode of or the forum in which the enquiry is to take place does not alter the time when the Court-fee upon future mesne profits is payable. It must be presumed that the Legislature? did not intend to effect any change in this respect and that the law as to the Court-fee governing the matter which existed prior to the present Code was considered by the Legislature to be sufficient to meet the present situation created by the Code of 1906 whereby the Court passing a decree for possession can declare the plaintiff's rights to recover mesne profits and then hold an enquiry to ascertain the amount of mesne profits-and embody the same in a final decree capable of execution.

30. Both under the new and the old Codes the plaintiff need only state

"approximately the amount of mesne profits sued for" and upon the amount so stated he is required to pay ad valorem-Court-fee under Section 7(iv)(f) of the Court Fees Act at the time of filing the plaint. But the amount actually found due to him may exceed the rough valuation stated by him in the plaint. For this contingency the Court Fees Act makes provision in Section 11. This section is split up in two parts or paragraphs. The first relates to the excess amount found upon an enquiry in the suit itself and incorporated in the decree of the Court. Under the old Code, the Court could determine the amount of mesne profits pendente lite up to the institution of the suit and pass a decree for it along with a decree for possession. The Court could not, under the old Act, determine the future mesne profits in the suit and pass a decree therefor. Under the present Code, the Court can determine past and future mesne profits in the suit itself and make a decree called a final decree for the mesne profits capable of execution. The first paragraph applied in practice formerly to a decree for mesne profits which accrued up to the institution of the suit. Inasmuch as under the present Code, a decree may be passed in the suit itself called the final decree for future mesne profits as well, hence the first paragraph would apply to such a decree also. The change in the Procedure Code did not necessitate any change in the first part of Section 11, as the words employed therein are sufficient to cover such a decree. Where the plaintiff in his plaint for recovery of possession of Immovable property claims a determination of his right to past and future mesne profits, his suit is a "suit for Immovable property and mesne profits" in terms of Section 11. Mesne profits, past and* future, are to be regarded in such a plaint as one entire claim for mesne profits, to use the language of Chief Justice Sargent in the case of Ram Krishna Bhikaji v. Bhimabai 15 B. 416 : 8 Ind. Dec. (N.S.) 283. In such a case the plaintiff approximately states the amount of past mesne profits which had already accrued to him at the time the suit is instituted" and accordingly values the amount of mesne profits, which, at that time, was not capable of ascertainment, becomes so and is actually ascertained by the Court and a decree is passed thereon under Order XX, Rule 12. If the amount of mesne profits thus found and decreed exceeds the amount of past mesne profits approximately stated by the plaintiff, Section 11, para. 1 says that "the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed, shall have been paid to the proper officer." Under this clause the Court-fee upon the future mesne profits is not to be paid until the same has been actually determined and no time is to be fixed for the payment of such a Court-fee nor the claim for mesne profits is to be dismissed on failure to pay the Court fee. The penalty in this clause is that the decree for mesne profits, whether past or future, "shall not be executed" until the excess Court-fee is paid. In the Fall Bench case of the Calcutta High Court referred to above Bidyadhar Backer v. Manindra Nath Das MANU/WB/0098/1925 : 89. Ind. Cas. 726 : 29 C.W.N. 869 : 42 C.L.J. 19 : A.I.R. 1925 Cal. 1076. where after the plaintiff had obtained possession of the property and applied, under Order XX, Rule 12, for the ascertainment of future or pendente lite mesne profits and valued his claim at Rs. 3,000, and the question was whether this valuation affected the jurisdiction of the Munsif who had decreed the suit, it was held that the plaintiff's valuation in the application did not affect the jurisdiction of the Munsif which he originally had at the time the suit for possession was brought to enquire into the mesne profits. The decision was based upon the view that the plaintiff in such as case is not required, nor is it possible for him, to value even approximately the amount of mesne profits pendente lite, which must vary according to the period the defendant retains possession of the property. It was further observed that the plaintiff is not required to value the subsequent mesne profits in advance or at a higher value than is leviable by law, i.e., the value of

mesne profits claimed up to the date of the institution of the suit; he cannot value subsequent mesne profits in advance. It follows from the above observations in that case that the plaintiff in the present case could not be asked to pay any Court-fee upon the amount of mesne profits stated by him in his application for ascertaining the actual amount of mesne profits due to him. This view is supported by the case of Sellamuthu Servagar v. Ramaswami Pillai 12 M.L.J.86.

31. In the present case the High Court which passed the decree for possession directed that the mesne profits "shall be ascertained in the execution." If the application of the judgment debtor was an application to ascertain the mesne profits in execution-proceedings, the second Clause of Section 11 would apply to it. The second Clause says' that where the amount of mesne profits is, left to be ascertained in the course of the execution of the decree and if the profits so ascertained exceed the profits claimed, then the further execution of the' decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. Thus if this clause applied the Court could not ask the plaintiff to pay any Court-fee until the amount was ascertained, much less could it make the payment of Court-fee a condition precedent for the enquiry as to the amount payable as mesne profits. Section 11 of the Court Fees Act is the only provision under which additional Court-fee could be demanded upon mesne profits and under that clause no fee is demandable until the actual amount is ascertained and found in excess of the amount for which Court-fee has already been paid whether the enquiry for ascertainment of mesne profits is made in the course of the suit or in execution proceedings. If the decision of this Court in the case of Nand Kumar Singh v. Bilas Ram Marwari 40 Ind. Cas. 579 : P.L.J. 67 : 1 P.L.W. 781. and the circular issued on the strength of it lay down a different rule, I would respectfully differ from it. The decision does not quote any authority in support of it nor does it take into consideration the true meaning and import of the provisions in the Court Fees Act. In the case of Maiden v. Janakiramayya 21 M. 371 : 7 Ind. Dec. (N.S.) 619. where in a suit for land with mesne profits a decree, was passed for the plaintiff in which the amount of mesne profits was left to be determined in execution, the date from with they should be computed being the date of the suit, the defendant appealed against the decree on the ground that he should not have been decreed to pay either mesne profits or cost. He did not pay any Court-fee and it was held that no Court-fee was payable in respect of the mesne profits subsequent to the' institution of the suit. This case supports the view that no Court-fee is payable for future mesne profits unless it is ascertained. Therefore the order of the Court refusing to ascertain the mesne profits before the Court-fee was paid upon the amount 'mentioned in the plaintiff's application' seems to me to be illegal and without jurisdiction. In reason also it would appear to be so, for the plaintiff might be found entitled to much more or much less than the amount of mesne profits named by him in the application. My answer, therefore, to the second question is in the negative, viz; that the learned Subordinate Judge had no jurisdiction to require the plaintiff to pay additional Court-fee as a condition for pro-seeding with the investigation of the claim, nor had he any jurisdiction to dismiss the proceedings if the additional Court-fee was not paid.

32. I have already held that there is no provision in the Court Fees Act for payment; of the Court-fee demanded by the Court and the application for ascertaining the mesne profits, therefore, could not be rejected. Supposing for argument's sake that no enquiry into the amount of mesne? profits could be made unless Court-fee upon the mesne profits claimed by the plaintiff in his application was paid beforehand, no written application was necessary for asking for an investigation into it and a verbal

application was sufficient for the plaintiff to demand an enquiry into the matter. The Court-fee was actually paid on the 13th September and it appears from the order-sheet that the Court was asked to hold an enquiry. Therefore there was before the Court on the 13th September a proper Court-fee paid with a prayer for holding an enquiry into the amount of mesne profits. The Court had no right to refuse to enter into an enquiry for ascertaining mesne profits and, as a matter of fact, it proceeded to enquire into the matter. If the order of the 30th August 1924 was without jurisdiction, the order of the 13th September 1924, though wrongly stated to have been passed under Order IX, Rule 4, should be deemed to have been really passed by virtue of the inherent jurisdiction of the Court vested by Section 151 for the ends of justice. The operative part of the order of the 9th September is contained in the concluding sentence of the order. It restores the application which was dismissed implying thereby that the order passed without jurisdiction on the 30th August was set aside. In the case of Debi Bakhsh Singh v. Habib Shah MANU/PR/0024/1913 : 19 Ind. Cas. 526 : 40 I. A. 151 : 35 A. 331 : 17 C.W.N. 829 : 11 A.L.J. 625 : 18 C.L.J. 9 : 15 Bom. L.R. 640 : 14 M.L.T. 33 : (1913) M.W.N. 566 : 25 M.L.J.140 : 16 O.C. 194 (P. C). the plaintiff's suit was dismissed for default. It appears that the plaintiff had died before the dismissal and that subsequently upon an application of his son, the order was set aside under Order IX, Rule 9, C. P.C. But on appeal by the defendant, the Judicial Commissioner set aside the order as the application was not made within 30th day under Order IX, Rule 9 of the C. P.C. Lord Shaw set aside the order of the Judicial Commissioner of Oudh and observed as follows: "By the C. P.C., Section 151, it is provided that 'nothing in this Code shall be deemed to limit or otherwise affect the inherent power...as may be necessary for the ends of justice, or to prevent abuse of the process of the Court.' In their Lordships' opinion such abuse has occurred by the course adopted in the Court of Judicial Commissioner.' Quite apart from Section 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But Section 151 could never be invoked in a case clearer than the present, and their Lordships are at a loss to understand why, apart from points of procedure and otherwise, it was not taken advantage of."

33. The Subordinate Judge, in the present case, had, therefore, inherent power to set aside his order dismissing the application and to treat it as null and void and this should be the view taken of his subsequent order restoring the application though it purports to have been passed under a wrong section of the C.P.C.

34. As to the first question, it seems to me that inspite of some divergent views taken in some cases, the Court-fee is leviable upon the amount of mesne profits for to period subsequent to the date of the institution of the suit when that sum is actually ascertained. There is no provision in the 'Court Fees Act exempting such a claim for the payment of duty. On the other hand, Section 11 clearly indicates that fee is leviable upon future mesne profits. The plaintiff could restrict his claim to the mesne profits which accrued up to the date the suit for possession was instituted and reserve his claim with respect to future mesne profits for a subsequent suit, for the cause of action for future mesne profits had not then arisen. The future mesne profits which were incapable of being estimated at the time when the suit for possession was instituted can become ascertainable and capable of valuation at a future date, and there is no reason why the plaintiff would not have to pay Court-fee when the amount is actually ascertained.

35. His liability to pay Court-fee, therefore, does not cease, because in the suit for possession he was permitted for the sake of convenience and to avoid multiplicity of

suits, to include in one suit a claim for past and future mesne profits. The real distinction seems to be that no Court-fee is payable upon future mesne profits until they are ascertained, but when ascertained they, are chargeable with duty under Section 11, the failure to pay which causes the penalty imposed by that section. This view is supported by the case of Dwarka Nath Biswas v. Debendra Nath Tagore 33 C. 1232.

36. The answers which I have given above to the questions referred to this Bench" for decision lead to the conclusion that the defendant's application should be dismissed and the Rule discharged.

37. As regards costs, I agree to the order proposed by Hon'ble the Chief Justice.

Das, J.

38. I agree with my Lord the Chief Justice.

Foster, J.

39. I agree generally; but in particular I wish to express my agreement with the view propounded in the judgment of my learned brother Jwala Prasad, J., as to the applicability of the second Clause of Section 11 of the Court Fees Act to the provisions of the present C. P.C. in respect of suits for recovery of land and for ascertainment of mesne profits.