

(1958) 02 PAT CK 0006

Patna High Court

Case No: Civil Revision No. 375 of 1954

Ramsewak Kaji and
Others

APPELLANT

Vs

Ramgir Choudhary and
Others

RESPONDENT

Date of Decision: Feb. 26, 1958

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 12

Citation: AIR 1958 Patna 448

Hon'ble Judges: R.K. Choudhary, J

Bench: Single Bench

Advocate: Tarkeshwar Nath, for the Appellant; J.C. Sinha and Ram Narain Tewary, for the Respondent

Final Decision: Allowed

Judgement

R.K. Choudhary, J.

This is an application in revision by the judgment-debtors and is directed against the order of the 1st Additional Subordinate Judge of Motihari, dated 22-4-1954, directing an enquiry to be made for the ascertainment of the amount of damages. The short facts are these. The plaintiffs opposite party filed Title Suit No. 120 of 1945, in the Court of Subordinate Judge, Motihari, against the petitioners for a declaration that they are entitled to irrigate their lands from river Sheoraha and that defendants had no right to obstruct the flow of the river. The plaintiffs also claimed a sum of Rs. 4,500/- as damages caused to their crops due to the construction of a bandh by the defendants in the river and further prayed for a decree for future damages. One of the issues framed in the suit was issue No. 8 which was in the following terms :

"Are the plaintiffs entitled to damages? If so, how much?"

It appears that during the hearing of the suit a petition was filed on behalf of the plaintiffs on the basis of which the learned Subordinate Judge, while decreeing the suit of the plaintiffs with regard to the declaration of their right to irrigate the lands, left the question covered by the above issue open and observed as follows :

"In view of the plaintiffs' petition dated 28-10-1946, this issue need not be decided at this stage. By their petition the plaintiffs prayed that, this issue should be left to be determined after the disposal of the suit. This issue is, therefore, left open for future determination."

The suit was decreed in the following terms :

"that the suit be and the same is hereby decreed modifiedly on contest. It is hereby declared that the plaintiffs are entitled to irrigate the southern portion of Belwa and Bairia and the lands lying north of pyne No. 216 of Jaimunia from the eastern Sheoraha. It is, further, held that the disputed bundh will remain intact to the extent of its 3 feet height only and the surplus water of the river would flow down to its lower course to irrigate the plaintiffs' fields and the defendants would not be entitled to raise it higher than that.

In the circumstances of the case, the parties will bear their own casts. Defendant No. 1 is directed to remove the earth from the portion of plot No. 607 lying just below the disputed bandh within a month from to-day. Defendants are also directed to bring down the height of the disputed bandh to 3 feet within the same period. In case of non-compliance, the obstruction would be removed on plaintiffs' petition at defendants' costs."

Against the above decree the defendants preferred a first appeal in this Court being First Appeal No. 32 of 1947, and the plaintiffs filed a cross-objection. The appeal and the cross-objection were allowed in part by this Court but the extent to which they were allowed is not relevant for the purpose of present enquiry. On 9-12-53 the plaintiffs made an application in the above title suit for determination and ascertainment of damages from 1352 fasli to 1361 fasli and claimed Rs. 47,670/8/- as damages.

The petitioners objected to the determination of damages in this suit as they contended that in the suit the right of the plaintiffs to get damages was not determined and as such the court had no jurisdiction to ascertain the amount of damages. That objection was overruled by the learned Additional Subordinate Judge and hence this present civil revision application has been filed in this court.

2. It is not disputed that the amount of damages or mesne profits can be ascertained by a separate proceeding if there has been a decree passed in favour of the decree-holder entitling him to damages or mesne profits. The question, however, is different if by the decree the right to claim damages or mesne profits has not been determined. Mr. Tarkeshwar Nath appearing for the petitioners has contended that, unless the right of a plaintiff to get damages or mesne profits is determined in the suit itself, no proceeding can be taken for ascertainment of the amount of damages or mesne profits.

He has further contended that, if the plaintiff has not been given a decree entitling him to damages or mesne profits, his right to get the same cannot be determined after the disposal of the suit. The contentions, in my opinion, are valid and must prevail. Mr. Jagdish Chandra Sinha appealing for the plaintiffs opposite party has conceded that the decree passed in Title Suit No. 120 of 1945, does not mention about the right of the plaintiffs to be entitled to get damages. But his contention is that the question of the liability of the defendants for damages and the amount of such damages was left open by the court to be determined after the disposal of the suit and therefore, they were perfectly entitled to ask the court after the disposal of the suit to determine their right for damages and to ascertain the amount of the same.

3. On the above contentions, the first question that may have to be decided is whether the amount of damages or mesne profits could be ascertained in a separate proceeding where by the decree no such right has been given to the decree-holder. In my opinion, the question with regard to the right of a plaintiff to get damages or mesne profits has necessarily to be determined in the suit itself and, in absence of a decree entitling him to get the same, the court has no jurisdiction in a subsequent proceeding either to ascertain the liability of the defendants to pay damages or to ascertain the amount of damages.

Before a court can proceed with an enquiry for ascertainment of damages or mesne profits, there must be a decree in favour of a plaintiff entitling him to damages or mesne profits. The enquiry for ascertainment of damages or mesne profits has necessarily to end in the passing of a final decree but, before such enquiry could be made, that right must be created by the preliminary decree itself. In the present case no such right had been declared in the preliminary decree and, therefore, the court had no jurisdiction to start any enquiry in that regard.

The view that I have taken gains support from a Bench decision of this court in Lalji Singh v. Dwarika Singh, Second Appeal No. 166 of 1945, D/- 16-12-1948 (A), in which it was held that, there being no direction in the decree passed in the suit for possession to the effect that the plaintiff was entitled to mesne profits which he could get ascertained in a subsequent proceeding, the application filed by the plaintiff with a prayer for appointment of a commissioner for ascertainment of mesne profits could not be entertained by the court and the court clearly had no jurisdiction to institute any such proceeding. In that case what happened was that, though no prayer for mesne profits was made in the plaint, an issue was framed before the hearing of the suit commenced to the effect as to whether the plaintiffs were entitled to a decree for mesne profits; and if so, for what amount. The ordering portion of the judgment did not say anything about the mesne profits and it concluded as under :

The suit be decreed after contest against defendants 3 to 5 and ex parte against the rest with costs. The title of the plaintiffs over the suit-land is hereby declared, and it is held that they are entitled to recover possession of the same."

The decree which was prepared followed the judgment and thus there was no direction in the decree either declaring the right of the plaintiff to get mesne profits or to have the same ascertained in a subsequent proceeding. Subsequently an application was made on behalf of the plaintiffs praying that a commissioner be appointed to ascertain the amount of mesne profits and, in spite of the objection raised by the defendants the court below passed a decree for mesne profits against the defendants.

On appeal by the defendants to this Court, it was held that, there being no decree in favour of the plaintiffs for mesne profits, the court had no jurisdiction to ascertain the amount of mesne profits and the decree passed by it was without jurisdiction. It was accordingly set aside. This case is on all fours with the facts of the present case. Here also, as already stated, there was no decree passed in favour of the plaintiffs entitling them to any damages from the petitioners.

4. The above view also gains support from a decision of Madras High Court in [Gedela Atchayya and Others Vs. Koppiseti Appalaraju and Another](#), in which Chandrasekhara Aiyar, J., as he then was, held as follows :

"For a final decree there must be a preliminary decree, and the preliminary decree must say some-thing which the final decree is to carry into effect. Where the preliminary decree awards no future mesne profits, there can be no final decree awarding the same."

Applying this principle; about the correctness of which there can be no doubt, the court in the present case could not institute a proceeding for ascertainment of damages unless the decree gave in terms any right to the plaintiffs to be entitled to any damages.

5. Mr. Sinha appearing for the opposite party, however, has placed reliance on the cases of AIR 1933 43 (Privy Council) , [Kuchwar Lime and Stone Co. Ltd. Vs. Secy. of State](#) , [Panikkathe Kutti Pennu Maruvalamma's son Raghava Mannadiar Vs. Panikkathe Kutti Pennu Maruvalamma's son Theyyunni Mannadiar](#), and [Ganeshi Lal Sharma Vs. Sm. Snehalata Dassi](#). None of these cases, in my opinion, has any bearing on the question at issue.

In the Privy Council case the court had actually passed a decree entitling the plaintiffs to mesne profits but the question of the amount of damages was left to be determined by a petition in a separate proceeding. On appeal the High Court dismissed the claim for mesne profits on the ground that the plaintiffs had failed to prove the amount of damages till the date of the suit which they ought to have done in the suit itself. Their Lordships of the Judicial Committee held that the course adopted by the trial Court was a very usual, a very proper and very convenient course and the trial Court had an inherent jurisdiction in determining as to how the suit should be conducted and the claim for damages should be allowed.

In other words, their Lordships held that, where the court had actually passed a decree for awarding mesne profits or damages, the question for determining the amount of such

mesne profits or damages could be left open to be determined by a separate proceeding. In the present case, as already stated, there is no decree entitling the plaintiffs to any damages. That case, therefore, has no application to the facts of the present case. The same comment applies to the case of : [Kuchwar Lime and Stone Co. Ltd. Vs. Secy. of State.](#) . In that case also the decree had given a right to the plaintiff to get damages and the question of the ascertainment of the amount was left to be determined at a later stage.

In [Panikkathe Kutti Pennu Maruvalamma"s son Raghava Mannadiar Vs. Panikkathe Kutti Pennu Maruvalamma"s son Theyyunni Mannadiar.](#) , Somayya, J., as he then was, held that the fact that the plaint in a partition suit does not contain a specific prayer for profits from the date of the suit and the preliminary decree in the partition suit does not provide for profits subsequent to the date of the suit and does not contain a direction that the defendant should be liable for profits does not preclude the court from entertaining the plaintiff"s claim for such profits at the stage of the final decree. Apparently this decision seems to be in favour of the plaintiffs decree-holders. But on reading the decision as a whole I do not think it is of any assistance to them. Referring to the decision in *Gulusam Bivi v. Ahamadsa Rowther* ILR Mad 296: AIR 1919 Mad 998 (G), his Lordship, says :

"That no doubt is an authority for the position that if the preliminary decree does not contain a direction for enquiry into subsequent profits, it should not be gone into at the stage of the final decree. But this case has never been followed by this Court on the question of profits subsequent to the date of suit in partition) actions."

His Lordship has made a distinction between an enquiry for mesne profits in an ordinary suit for possession which has to be made under Order XX, Rule 12 of the CPC and an enquiry for mesne profits in a suit for partition which has to be made under Rule 18 of that Order.

In the case of [Ganeshi Lal Sharma Vs. Sm. Snehalata Dassi.](#) it was held that under normal circumstances it is usual for the court to pass a preliminary decree regarding mesno profits which accrued after the commencement of the suit, but the court would not be within its rights if it passes a decree for mesne profits payable subsequently to the suit, if in the circumstances of the case, an enquiry is unnecessary or waived by the parties. The ratio of that case has no bearing to the facts of the present case. Here, there is no question of any waiver by the parties regarding enquiry, Moreover, the facts of that case are absolutely different.

6. It has then been contended by Mr. Sinha on behalf of the plaintiffs opposite party that in the present case the entire issue No. 8 regarding the right of the plaintiffs to damages and the ascertainment of the amount of damages was left open to be determined by the court after the disposal of the suit and, therefore, the defendants had a right to make an application for the determination of the above issue. The order of the trial Court on that issue is, as the order itself shows, based on the application said to have been made by

the plaintiffs on 28-10-1946.

That application is not before me. But the order sheet of the title suit dated 28-10-1946, gives a clear indication that the petition of the plaintiffs filed on that date was only to postpone the ascertainment of the amount of mesne profits till after the disposal of the suit and not to postpone the determination of the liability of the defendants for damages. That order says :

"Plaintiffs file a petition praying for ascertaining the amount of damages after the disposal of this case and that no evidence will be adduced on that point at present. Keep it on the record."

Mr. Sinha also has conceded that by that application the plaintiffs never meant to postpone the determination of the rights and liabilities of the parties regarding damages. That being the position, the court had no jurisdiction to postpone the determination of that point till after the disposal of the suit.

The non-determination of the rights and liabilities of the parties for damages, in my opinion, amount to the rejection of the plaintiffs' claim for damages. This view gains support from a recent Bench decision of this Court in [Ganesh Jha Vs. Baidyanath Jha and Others](#) . In that case in a previous suit brought by the plaintiff the question of legal necessity was not decided although the issue was raised as the court wrongly thought that the question could not be gone into because all the reversioners had not been impleaded in the suit and the court observed that the plaintiff was at liberty to file a fresh suit.

It was held that, notwithstanding such observation which the court had no jurisdiction to make, the leaving of the question undecided amounted to have impliedly decided it against the person raising that question. On this principle, the postponement of the question of the liabilities of the defendants for damages to be determined after the disposal of the suit amounted to the rejection of the claim of the plaintiffs for damages. It may be noted here that the plaintiffs preferred a cross-objection in the High Court but, as has been conceded by Mr. Sinha, they did not take a ground in their cross-objection with regard to the non-determination of their rights for getting damages from the defendants.

In that view of the matter, I do not think the plaintiffs are entitled to raise that question in a subsequent proceeding. Mr. Sinha, however, has placed reliance on a Bench decision of this, court in [\(Mahtha\) Madan Singh and Others Vs. Kumar Kamakhya Narain Singh](#) . In that case an ex parte decree was made which included a direction that mesne profits should be ascertained. The parties, however, entered into compromise and a compromise petition was filed in court under which the defendant agreed to pay by way of mesne profits, a certain sum of money in certain instalments. A decree incorporating the compromise was, however, omitted to be prepared.

On default of payment of instalments, the decree was sought to be executed and it was contended by the judgment-debtor that, as there was no decree, there was nothing to be executed. In those circumstances, it was held that it was the duty of the court to pass a final decree in terms of the compromise and omission so to do on the part of the court, accidental or otherwise, should not deprive the decree-holder of the fruits of his action. Mr. Sinha has argued that in this case also it was the omission of the court in not declaring the right of the plaintiffs to be entitled to damages and as such the plaintiffs should not suffer. I, however, do not agree with this contention.

In that case, their Lordships observed that on a plain reading of the provisions of the Code of Civil Procedure, namely, Order XXIII, Rule 3 and Order XX, Rule 12 it was obvious that it was unnecessary for the decree-holder to apply for a decree as such and the duty of the decree-bolder was only to bring to the notice of the court that a comoromise had been entered into. It was further observed that that requirement was complied with when the parties filed a petition of compromise and, on such petition being presented, it was the duly of the court to prepare a final decree,

Their Lordships further held that there was an omission of the court but there was no omission of the parties and the question that remained then to be decided was whether by the omission of the court injustice should he done to the decree-holder. In the present case, as already observed, there is a clear omission on the part of the plaintiffs in not raising this question in their cross-objection. If the court, omitted to determine the question, the plaintiffs had a right to go up in appeal.

That not having been done, they cannot be permitted to say that they should not suffer for the omission of the court though they were themselves guilty for omission on their own part.

7. For the reasons, given above, it is not possible to uphold the decision of the court below. The result, therefore, is that the application is allowed, the order of the court below directing the ascertainment of damages is set aside and the application made by the plaintiffs on 9-12-53 praying for determination and ascertainment of damages is dismissed. In the circumstances of this case, there will be no order as to costs.