

**(1924) 03 CAL CK 0004**

**Calcutta High Court**

**Case No:** None

Chhaganmull Agarwalla and  
Others

APPELLANT

Vs

Amanatulla Mohammad  
Prodhan and Another

RESPONDENT

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**Date of Decision:** March 13, 1924

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 2(12)
- Criminal Procedure Code, 1898 (CrPC) - Section 146

**Citation:** 83 Ind. Cas. 529

**Hon'ble Judges:** Mukerji, J; Hugh Walmsley, J

**Bench:** Division Bench

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### **Judgement**

Mukerji, J.

The suit out of which this appeal arises was instituted by the plaintiff for recovery of possession of 12 hals of land with mesne profits. The plaintiffs claimed to have purchased a durchukani tenancy comprising of 16 hals of land under a kobala dated 1312 B.S. from certain persons who along with two others (who subsequently left the land) had obtained dur-chukani settlement in respect of the said quantity of land. The chukani out of which this dur-chukani settlement was made comprised of 17 1/2 hals of land. There were proceedings under section. 145, Criminal Procedure Code, between the plaintiffs and the defendants, which ended in an order under that section in respect of 4 hals in favour of the plaintiffs, 3 hals in favour of the defendants, and an order u/s 146, Criminal Procedure Code, in respect of the remaining 9 hals of the durchukani. The plaintiffs instituted the suit for the 12 hals of which he had failed to be declared in possession as aforesaid.

2. The Subordinate Judge gave the plaintiffs a decree for recovery of possession in respect of 53 acres of land, viz., such of the suit-plots as were recorded in the settlement khatian as the plaintiffs' durchukani, The other plots claimed in the suit

were shown in the khatian as patit and there was no note against them of the dur-chukanidars possession; and in respect of them the plaintiffs' suit was dismissed. The Subordinate Judge also directed that the plaintiffs be awarded mesne profits in respect of the said lands for which decree for recovery of possession was made.

3. By this direction in the decree the plaintiffs were awarded mesne profits not merely for 12 hals of lands of which they were deprived of possession by the orders under sections 145 and 146, Criminal Procedure Code aforesaid, but also of the 4 hals in respect of which their possession was maintained in the proceedings u/s 145, Criminal Procedure Code, as these 53 acres represented the portion of the durchukani consisting of 16 hals (65 1/2 acres) less an area of 12 acres odd consisting of a number of plots recorded in the khatian as patit.

4. On appeal by the plaintiffs, the District Judge held that with regard to the patit plots also plaintiffs' title was to be presumed as it was not shown that they had lost it by adverse possession or ouster, and he gave the plaintiffs a decree for recovery of possession in respect of all the lands, numbering them plot by plot in accordance with the khatian, which he found would comprise their entire 16 hals of dur-chukani with the exception of the 4 hals of which the plaintiffs were already in possession. On the defendants' cross-appeal he limited the direction as to mesne profits by ordering that in calculating the same the Amin would have to exclude the 4 hals of which the plaintiffs were all along in possession.

5. The defendants have appealed to this : Court and on their behalf the following four contentions have been put forward: 1st there was nothing to rebut the entry in the khatian, and the learned District Judge was wrong in departing from it, and he should have upheld the decree of the Subordinate Judge in respect of the 53 acres, so far as the claim for recovery of possession was concerned; 2nd, the decree was bad inasmuch as it left the determination of the identity of the lands to the amin; 3rd, the suit in so far as it related to the portion which was recorded as patit, was barred, as the dispossession by the defendants who are the plaintiffs' landlords must have taken place before the Record of Rights was finally published in 1916, and no suit was instituted before 1919; and 4th, that the directions as to calculation of mesne profits in respect of 9 hals which remained under attachment under the provisions of Section 146, Criminal Procedure. Code, could not stand.

6. The first and the third contentions may be disposed of at once. The learned District Judge has found as facts that the presumption arising from the entry in the Settlement khatian had been rebutted and that there was no adverse possession or ouster by the landlords such as would extinguish the plaintiffs' title. The second contention has no substance, as the learned District Judge has carefully set out the plots by their khatian numbers.

7. The fourth contention deserves consideration. The definition of mesne profits as given in the CPC Section 2, Sub-section (12) runs in these words "Mesne profits of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession." Wrongful possession by...the defendant is the very essence of a claim for mesne profits, and the very foundation of a decree therefor. In the case of Haradhun Dutta v. Joy Kisto Banerjee 11 W.R. 444, Jackson, J., observed that it would be impossible to hold the defendant liable for profits which he had not received and could not have received. In the case of Indurjeet Singh v. Baboo Radhey Singh 21 W.R. 269. Phear, J., observed as follows: "Generally from the nature of claim to mesne profits, mesne profits ought not to be estimated for any period during which the defendant, who is to be made responsible for them, was not active in keeping the plaintiff out "of possession." In that case the property was in the hands of a Receiver appointed by the Court and the learned Judge pointed out that the defendant could not be answerable for damages for mesne profits in respect of those years during which an officer of the Court and not the defendant was keeping the plaintiff out of possession. In the case of Abbas v. Fassih-ud-din 24 CAL. 413 : 12 Ind. Dec. (N.S.) 943 Trevelyan and Beverley, JJ., observed, " If the defendant was excluded from possession, she can scarcely be said to have been in wrongful or any possession. She cannot be said to have actually or even impliedly received the profits, nor could she, with ordinary or extraordinary diligence, have received them." It was further held in that case that a wrong-doer is not responsible for the acts of another wrong-doer who is independent of him. In the case of Ishan Chandra Burdhan v. Ain-ud-din Mia 5 C.W.N. 720, Hill, J., held that damages are claimable only for the period of the defendants' wrongful possession, actual or constructive. The same principle is deducible from the decisions in the cases of Churn Singh v. Rungoo Singh 15 W.R. 221 and Kishnanand v. Kunwar Partab Narain Singh 11 I.A. 88 : 10 C. 785 : 8 Ind. Jur. 335 : 4 S. P.C.J. 551 : Rafique and Jackson's P.C. No. 80 : 5 Ind. Dec. (N.S.) 526 (P.C.). In the case of Kali Charan. Sinha v. Ashutosh Sinha 38 Ind. Cas. 660 : 25 C.L.J. 140 Sanderson, C.J., at page 144 Page of 25 C.L.J.-[Ed] very clearly pointed out the necessity of the defendant being in possession during the period for which the mesne profits were claimable, and Mookerjee, J., at pages 147-148 on a review of the authorities laid down " that it is an elementary rule that in an action for mesne profits when the ground of the action is the bare fact of possession, damages can only be recovered for the time possession was actually retained." Applying these principles to the question which we have to consider, in my opinion it is impossible to hold, by any stretch of imagination, that during the time that the lands remained under attachment by the operation of the order u/s 146, Criminal Procedure Code, and the Court was in custody of it on behalf of the rightful owners, that is to say, of the plaintiffs in the present case, that the defendants were in possession of the lands. The direction regarding mesne profits in so far as it relates to the 9 halves of

land kept under attachment as aforesaid, cannot, therefore, be supported in law.

8. It is true that no objection as to the aforesaid matter was taken before the learned District Judge in the cross-appeal that was filed before him; but we are told that no decree for mesne profits such as is contemplated by Order XX, Rule 12, Civil Procedure Code, has yet been drawn up and at any rate none was in existence when the matter was pending before the learned District Judge. We, therefore, do not think that he was precluded from raising the point before us.

9. Subject to the observations made as above this appeal is dismissed; but under the circumstances of the case we make no order as to costs.

10. Let the record be sent down to the Court below as early as possible.

Walmsley, J.

11. I agree.