

After carefully considering all the aspects of the matter, we are clearly of the view that the present suit is barred by limitation and the trial Court was in error in holding the same to be within limitation.

The result, therefore, is that this appeal is allowed; the judgment and the decree of the trial Court is set aside and the plaintiff's suit is dismissed. In the circumstances of the case, however, there will be no order as to costs throughout.

NARULA, J.—I agree.

B.R.T.

APPELLATE CIVIL

Before Daya Krishan Mahajan, J.

BHAG SINGH—*Appellant*

versus

DAN SINGH AND OTHERS,—*Respondents*

Regular Second Appeal No. 1619 of 1963.

May 9, 1967

Transfer of Property Act (IV of 1882)—S. 6(e)—Right to mesne profits—Whether transferable.

Held, that the transfer of a right to recover mesne profits is hit by section 6(e) of the Transfer of Property Act and the transferee cannot bring an action to recover them.

Second Appeal from the decree of the Court of the District Judge, Bhatinda, dated the 14th day of August, 1963, reversing that of the Sub-Judge, 1st Class, Bhatinda, dated the 28th February, 1963, and dismissing the plaintiff's suit and leaving the parties to bear their own costs.

ATMA RAM, ADVOCATE, for the Appellants.

NEMO for the Respondents.

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JUDGMENT

MAHAJAN, J.—The only question in this second appeal is whether the right to mesne profits can be transferred. There is a conflict of judicial opinion whether the right in land as well as the right to mesne profits is transferable. One view is that the transferee can bring an action to recover mesne profits. The other view is that he cannot. This conflict has no bearing so far as the present case is concerned because here the right to recover mesne profits was transferred and not the land. The question is whether such a transfer is hit by section 6(e) of the Transfer of Property Act. The lower appellate Court has held that it is so hit. The transferee has come up in appeal.

Mr. Atma Ram, who appears for the transferee, contends that the right to mesne profits is an actionable claim and is not a mere right to sue. So far as decided cases go, excepting one, which is indirectly in point, they tend to show that the transfer of a right to recover mesne profits is hit by section 6(2). The earliest decision in point is *Shyam Chand Koondoo v. The Land Mortgage Bank of India, Limited* (1). The other decisions taking the same view are *Durga Chunder Roy v. Koilas Chunder Roy and others* (2), *Kocharla Seetamma v. Pillala Venkataramanayya and others* (3); *K. Chidambaram Pillai v. M. S. M. Doraiswami Chetty* (4), *Pusuluri Varahaswami v. Mantena Ramachandra Raju* (5); *Pragi Lal v. Fateh Chand* (6); and *Abu Mahomed v. S. C. Chunder* (7). No decision taking a contrary view has been brought to my notice. The only decision, which casts slight doubt, is the one in *P. Venkatarama Aiyar v. G. Ramaswami Aiyar and others* (8), wherein Sadasiva Aiyar, J., after noticing the cases of *Shyam Chand Koondoo v. Land Mortgage Bank*

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- (1) I.L.R. (1883) 9 Cal. 695.
 - (2) 2 Calcutta Weekly Notes 43.
 - (3) A.I.R. 1916 Mad. 473 (1).
 - (4) A.I.R. 1916 Mad. 974.
 - (5) 24 Madras Law Journal 298.
 - (6) I.L.R. (1883) 5 All. 207.
 - (7) I.L.R. (1909) 36 Cal. 345.
 - (8) A.I.R. 1921 Mad. 56.

of *India, Ltd.* (1), *Seetamma v. Venkataramayya* (9); and *Muthu Hengsu v. Netravati Naiksavi* (10), observed as follows :—

“ * * I am inclined to hold that those decisions are the result of what I consider, with the greatest respect, to be an unnecessarily close adherence to the development of the law of Torts in English Courts. I think a suit for mesne profits (as pointed out by my learned brother during the course of the argument) partakes more of the nature of a suit for account (along with which it is enumerated in the schedule to the Provincial Small Cause Courts Act). I think also that such a suit has under ordinary circumstances some affinity to a suit for money had and received and I see no reason why in India where according to the Privy Council the law of champerty and maintenance as developed in England has very little application, the transfer of a right to claim mesne profits should be held invalid.
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The learned Judge put a different interpretation on the decision in *Pusuluri Varahaswami*, than was put by other learned Judges in *Settamma's case*. But the most pertinent fact about this decision is that the learned Judges did not base their ultimate decision on the observations which I have already quoted above. They proceeded to decide the matter on a different ground which is set out below :—

“* * * It is, however, unnecessary to express a final opinion on the question whether a claim for mesne profits which has not been declared to exist in the transferor by a decree of Court can be validly transferred or not. Where, however, such a claim has been declared by a decree and if only the exact amount recoverable has been left to be ascertained in future proceedings in the same suit, I think, there can be no difficulty in holding that the transfer of such a right is valid, and I find that in *Prasanna Kumar v. Ashutosh Ray*, (11); and *Hari Prasad Misser v. Kodo Marya* (12), the validity of the transfer of such a right

(9) I.L.R. (1915) 38 Mad. 308.

(10) 58 I.C. 383.

(11) 20 I.C. 685.

(12) 37 I.C. 998.

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has been upheld. Following those decisions, I would dismiss this appeal with costs."

It will, therefore, appear that the observations of the learned Judge, that the transfer of a right to mesne profits is not hit by section 6(e) of the Transfer of Property Act, are merely obiter. In this situation, I am not prepared to accept Atma Ram's argument, based on the decision in *P. Venkatarama Aiyar's Case*. The learned counsel has also brought to my notice the decisions in *Jat Mal v. Hukam Mal Tani Mal and others* (13); *Seth Lachmi Narayan v. Dharamchand* (14); *Vatakkethala Thottungal Chakku's son Mathu v. Achu and others* (15); *Bharat Singh v. Binda Charan and others* (16); and *Subh Ram and others v. Ram Kishan and others* (17); in support of his contention. None of these cases has a direct hearing and are clearly distinguishable. In this view of the matter, I see no reason to differ from the decision of the lower appellate Court.

For the reasons recorded above, this appeal fails and is dismissed. But as there is no representation from the respondents, there will be no order as to costs. In view of the importance of the question involved. I certify this case as a fit one for appeal under Clause 10 of the Letters Patent.

R. N. M.

APPELLATE CIVIL

Before Daya Krishan Mahajan, J.

GURDIAL KAUR AND OTHERS,—*Appellants*

versus

MIHAN SINGH AND OTHERS,—*Respondents*

S.A.O. No. 31 of 1966.

May 9, 1967

Code of Civil Procedure (Act V of 1908)—Order XXI Rule 90—Sale in execution of a decree which is a nullity—Whether can be set aside even if the objections to the sale are barred by time.

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- (13) A.I.R. 1930 Lahore 820.
 - (14) A.I.R. 1926 Nagpur 396.
 - (15) A.I.R. 1934 Mad. 461.
 - (16) A.I.R. 1918 Oudh. 374.
 - (17) A.I.R. 1943 Lahore 265.