FULL BENCH

Before S. S. Sandhawalia, Man Mohan Singh Gujral and M. L. Verma, JJ.

SADHU SINGH, ETC.,—*Appellants.*

versus

PRITAM SINGH, ETC.,—*Respondents.*

SAO No. 39 of 1972.

May 8, 1975.

Code of Civil Procedure (Act V of 1908)—Section 2(12), Order 2 Rules 2 and 4—Suit for possession of a property without including the accrued mesne profits thereof—Subsequent suit for such mesne profits—Whether barred under Order 2 Rule 2—Expression "cause of action"—Meaning of.

Held (per majority, Sandhawalia and Verma JJ. Gujral J contra) that it is plain from the provision in Section 2(12) of the Code of Civil Procedure that the claim for mesne profits requires evidence of duration of wrongful possession, of profits which the person in wrongful possession may have actually received or in the alternative constructively which he might with ordinary diligence have received; and the quantum of interest on such profits. The evidence of this nature is hardly required to support a claim of possession. In a suit for possession it is sufficient for the plaintiff to prove his title to the property and the factum of possession within 12 years of the filing of the suit in order to succeed. Some facts in the two suits may be either common or similar, but mere similarity is not identity. Simply because in the two cases the facts may substantially run to an extent parallel to each other; or merely because certain matters are common in the two suits, cannot warrant a conclusion that the evidence in the suit for possession and in a suit for mesne profits may necessarily be identical. By the application of the test envisaged in Section 2(12) of the Code, the two causes of action that is for possession and for mesne profits are distinct and separate. Rule 2 of Order 2 of the Code is directed against the twin evils of the splitting up of claims and splitting up of remedies. It is obviously intended to avoid a multiplicity of actions. But, even a plain reading of the rule makes it evident that it is intended clearly to apply only to a claim based on one cause of action. It does not bar the bringing of a second suit if it is based on a distinct and separate cause of action. Except where a statutory provision provides otherwise, two suits can be brought upon facts which give

rise to two distinct causes of action. In order to attract the application of Rule 2 of Order 2, the previous suit as well as the subsequent suit must arise out of a single and indivisible cause of action and secondly the suit must be substantially between the same parties. The very opening words of Rule 4 of Order 2 of the Code are also a clear pointer to the fact that this provision treats a claim for the recovery of immovable property and a claim for mesne profits thereof as two distinct and separate causes of action, because this rule has to especially provide for joining a claim for mesne profits with a claim for the recovery of immovable property. If the two claims were a single indivisible cause of action, no necessity for a provision like sub-clause (a) of Rule 4 would arise and such a construction would render this provision wholly redundant and otiose. But for the provision of Rule 4(a) which provides any express exception, the prohibition of joining any other cause of action with a suit for recovery of immovable property would come into operation even in cases where the two claims were to be made. It is merely an enabling provision which allows the joinder of two causes of action. The conclusion, therefore, which inevitably seems to flow from reading rule 2 and Rule 4 together is that Order 2 treats cause of action for recovery of immovable property as distinct from a cause of action for the mesne profits thereof. A wrongful dispossession of immovable property or a continuance in adverse possession thereof is by itself an independent wrongful act. This would *perse* give rise to a cause of action to the plaintiff. If thereafter the person in wrongful possession continues to deprive the rightful owner of the usufruct of the said property either actual or constructive, he commits a second and independent wrongful act thus giving rise to another distinct cause of action. A wrongful dispossession of immovable property, therefore, is distinct and separate from the wrongful deprival of the usufruct thereof to its owner. There is no reason on principle why a plaintiff if so inclined may not acquiesce in the wrong of dispossession for some time till he chooses to recover the property (subject to limitation of 12 years) and yet claim from time to time (within the three years period of limitation) the profits of the land whilst it remains in the wrongful occupation of the defendant. Where a plaintiff sues for possession of land only, he may join the same action claims for mesne profits and damages, but it is open to him to bring a subsequent suit against the same defendants for the profits which became payable before the institution of the former suit and which might have been included in that suit. Hence where a suit for possession of a property has been filed without including the accrued mesne profits a subsequent suit for such mesne profits is not barred under Order 2, Rule 2.

Held, (Per Gujral J. Contra) that a claim for possession of property and a claim for mesne profits thereof from one cause of action.

In a suit for possession of property in order to succeed, the plaintiff has to prove his title to the property and the fact that he has been in possession within twelve years of the filing of the suit. In a suit for mesne profits, besides proving these facts the plaintiff has to prove the period during which the defendant had been illegally in possession and the profit which the person in wrongful possession of such property had received or might, with ordinary diligence, have received therefrom. It would, therefore, appear that the material part of the evidence in both the suits is the same. In fact, unless the plaintiff establishes his claim for possession, a claim for mesne profits will not arise. In order to establish his claim for mesne profits a plaintiff will lead substantially the same evidence which he would have to, in order to succeed in a suit for possession. The only additional fact which he will have to prove can be in respect of the quantum of the mesne profits involved. The expression "cause of action" in order 2 rule 4, has been used not in the sense it is used in Order 2 Rule 2, but in a different context. The only harmonious way in which Rule 4(c) of Order 2 can be read is if the expression "cause of action" occuring in the opening line of rule 4 is taken to imply "claim" and the rule is read to mean that no claim shall be joined with a suit for the recovery of immovable property except claims in which the relief sought is based on the same cause of action. All that rule 4(a) provides is that a claim for the recovery of immovable property and a claim for mesne profits or arrears of rent in respect of that property or any part thereof can be joined in one suit without the leave of the Court, and this rule provides that no cause of action shall be joined with a suit for the recovery of immovable property except claim for mesne profits or arrears of rent in respect of the property claimed or any part thereof unless the leave of the Court has been obtained. It does not necessarily carry an implication that a claim for mesne profits and a claim for possession of immovable property amount to separate and distinct cause of action. Having regard to the language of clause (c) of Rule 4 of Order 2, it is apparent that clauses (a) & (c) are not really exceptions but are merely explanations of rules embodied in Rule 2 Order 2. Hence a second suit for recovery of mesne profits is barred under Order 2 rule 2 of the Code, if in the earlier suit for recovery of possession of the immovable property, the relief is not claimed.

Held (per Gujral J.) that expression "cause of action has not been put into the straight-jacket of a precise or even a general definition either in the Code of Civil Procedure or any other statute. The expression is of a varying and doubtful meaning and because of its finer shades, it is not easy to put the concept in a steel frame. It has, however, been broadly defined as meaning every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. The cause of action has no

relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.

Case referred by Hon'ble Mr. Justice Man Mohan Singh Gujral,— vide his order dated 16th November, 1973, to a Full Bench, for decision of an important question of law involved in the case. The Full Bench consisting of Hon'ble Mr. Justice S. S. Sandhawalia, Hon'ble Mr. Justice Man Mohan Singh Gujral and Hon'ble Mr. Justice Muni Lal Verma finally decided the case on 8th May, 1975.

Second Appeal from the order of the Court of Shri P. R. Aggarwal, Additional District Judge, Ambala, dated 3rd December, 1971, reversing that of Shri J. K. Sud, Sub-Judge III Class, Ambala, dated 25th August, 1970, accepting the appeal and setting aside the judgment and order of the learned trial court, dated 25th August, 1970 and remanding the case back to the learned trial court with the direction that this suit shall remain stayed under the provisions of section 10 C.P.C. till the earlier suit a copy of the plaint of which is Exhibit D. 1 is decided and Leaving the parties to bear their own costs.

K. K. Aggarwal, and G. C. Garg, Advocates, *for the appellants.*

H. L. Sarin, Advocate with M. L. Sarin, M. S. Libarhan, and S. K. Gawari, Advocates, *for the respondents.*

JUDGMENT

S. S. SANDHAWALIA, J.—The issue of law arising from virtually undisputed facts in this reference may well be formulated in the following terms:—

> "Whether Order 2, rule 2 of the Code of Civil Procedure 1908, bars a suit for mesne profits filed subsequently to a suit for possession of the property because the claim for those accrued mesne profits had not been earlier included therein?"

It suffices to advert to the relevant facts briefly. The subject-matter of the dispute is the urban property situated at Circular Road, Ambala City. In January, 1966; Pritam Singh respondent, alone brought a suit for possession of the above-said property alleging *inter alia* that the defendants were in wrongful and unauthorised occupation thereof from the 14th of June, 1965. In this suit he did not include any claim for mesne profits which had accrued till the date of the filing of the same. That suit is still pending decision.

Later in 1968, Pritam Singh, respondent along with his sister Smt. Surjit Kaur; respondent together brought the present suit (from which this regular second appeal arises) for the recovery of Rs. 3,200 as mesne profits or in the alternative as damages for illegal use and occupation of the property above-mentioned from the original date of its unauthorised occupation.

(2) Apart from the other grounds the defendants resisted the second suit on two preliminary objections regarding which the trial Court struck the following two issues:—

(1) Whether the trial of the suit cannot be proceeded with in view of the provisions of section 10, Civil Procedure Code?

(2) Whether the suit is barred under Order 2, rule 2 of the Code of Civil Procedure as alleged in para 2 of the preliminary objections in the written statement.

Both the abovesaid issues were decided against the plaintiffs resulting in the dismissal of the suit. On appeal the learned Additional District Judge, Ambala, upheld the finding of the trial Court on issue No. 1; but on issue No. 2, he reversed the finding of the trial Court by holding that the suit was maintainable and not barred by the provisions of Order 2, rule 2 of the Code of Civil Procedure. The defendant-appellants in the present second appeal challenge the decision of the learned Judge on issue No. 2 quoted above.

(3) As is manifest the point at issue is one of pure law, and to be candid it is indeed not free from difficulty. My learned brother Gujral J., in his lucid order of reference to the larger Bench has noticed the head on clash of some of the authorities and in the course of argument many more were cited before us at the bar. I, therefore, deem it apt to examine the matter in its historical background and then on principle before adverting to the plethora of precedents on this point.

(4) As to the sources of the law and their history it is indeed possible to go back for more than a century in this context. There is no manner of doubt that the earliest Indian Civil Procedure Codes were modelled on the language and patterned to follow the principles and procedures of the then existing English law. At common law claims for ejectment and for mesne profits were always treated as separate causes of action so much so that an action for mesne profits did not even lie until judgment had been recovered in ejectment. It was only after the enactment of the Common Law

Procedure Act, 1852, that the two actions were even enabled to be joined. Adopting the above-said rule; the Indian Code of Civil Procedure 1859, expressly provided that a claim for recovery of land and a claim for mesne profits arising out of such land should be deemed to be distinct causes of action. Indeed the relevant section 10 thereof may usefully be quoted verbatim—

> "10. A claim for the recovery of land and a claim for the mesne profits of such land shall be deemed to be distinct causes of action within the meaning of the two last preceding sections."

Subsequently in England the Judicature Act and the Rules of Practice framed thereunder came into force. Therefore, when the Indian Code of Civil Procedure was remodelled and enacted in 1877, the language of the Judicature Act and the rules thereunder which were then the existing law was in many instances incorporated and substituted for the earlier language of the Indian Code of Civil Procedure, of 1859. As a result, therefore, section 10 of the earlier code quoted above was substituted by section 44 of the Code of Civil Procedure 1877 (which is in *pari materia* with Order 2, rule 4 of the present Code of Civil Procedure 1908). A reference to the corresponding provision would show that the language of section 44 was taken from Order 17, rule 2 of the English Rules framed under the Judicature Act. Therefore, despite the change of terminology it is more than patent that no change in the law was at all intended either in England or in India from the settled rule (earlier at English Common Law and later in terms adopted by the statutes). that claims for mesne profits and claims for the possession of the property were distinct and separate causes of action. To reiterate, it is apparent that the rule explicitly laid in section 10 of the 1859 Code was intended to be continued and the mere change of language owning to the reasons above-noticed was not calculated to depart from the earlier settled law on this point. It then deserves mention that rules 1, 2 and 4 of Order 2 of the present Code of Civil Procedure 1908 and in *pari materia* with sections 42, 43 and 44 of the Code of Civil Procedure 1877 and, therefore, patently intended to continue the existing law. As a matter of chronology therefore, it is evident that for more than a century the English Common Law and the subsequent statutes and the Indian procedural Codes patterned thereon had considered the claim of mesne profits and the claim of possession of the property as two distinct and separate causes of action'.

(5) Examining the matter on principle, apart from its history, the core of the issue here is whether a claim for the possession of the property and a claim for the mesne profits arising therefrom are two distinct and separate causes of action or whether they constitute a single and indivisible cause. Necessarily, therefore, the question arises as to what is the exact import of the term 'cause of action.'

(6) Though the above-said term of art arises invariably in civil litigation it is significant to notice that the present Code of Civil Procedure has not chosen to define the same in section 2 thereof. Equally it has to be borne in mind that in precedents extending over centuries no attempt even has been made to lay down an exhaustive and precise definition of the term cause of action'. That bein so it would indeed be pedentic to do what is perhaps neither possible nor desirable. It suffices to recall what the Corpus Juris Secundum has to say on the point:—

> "Cause of action is a term of varying and doubtful meaning, and because of its many different and delicate shades of meaning according to the circumstances in which it is used, the courts have found it difficult to give any general definition of the term, and perhaps no definition could be framed which would be entirely free from criticism although it has been said that there is no legal expression the meaning of which is more clearly apparent."

(7) Even though no precise definition may be possible it nevertheless becomes essential to have a broad inkling of what the term 'cause of action' implies and it is perhaps best to adopt the meaning attributed thereto by Lord Esher, Master of Rolls, in *Read* v. *Brown* (1):—

> "* * * What is the real meaning of the phrase 'a cause of action arising in the City'? It has been defined in *Coo* v. *Gill* Law Rep. 8 C.P. 107 to be this; every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved."

(1) (1889) 22 Q.B.D. 128.

The above-said observations have the merit of approval in *Mohammad Khalil Khan and others* v. *Mahbub Ali Mian and others* (2), wherein their Lordships also have laid down the tests that may be applied in cases falling under Order 2, rule 2 in order to determine whether the claim in a new suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit.

(8) One of the salient tests laid down by Sir Madhwan Nair in *Mohd. Khalil Khan's case* (2) above is that if the evidence to support the two claims is different then the causes of action are also different. Applying this test, can it be said that the evidence to support a claim for the possession of property is identical with the evidence required for establishing a claim for mesne profits ? The answer, to my mind, appears to be patently in the negative. Section 2(12) of the Code of Civil Procedure defines the term as follows:—

> "2(12) '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."

As is plain from the above-said provision the claim for mesne profits may well require evidence of the duration of wrongful possession; of profits which the person in wrongful possession may have actually received or in the alternative constructively which he might with ordinary diligence have received; and the quantum of interest on such profits. Can it possibly be said that evidence of the above-said nature is equally required to support the claim of possession? In my view it is hardly so. In a suit for possession it might well suffice the plaintiff to prove his title to the property and the factum of possession within 12 years of the filing of the suit in order to succeed. At the highest it can be said that some facts in the two suits may be either common or similar. But as has often been said mere similarity is not identity. Merely because in the two cases the facts may substantially run to an extent parallel to each other; or simply because certain matters are common in the two suits cannot warrant a conclusion that the evidence in a suit for

(2) A.I.R. 1949 P.C. 78.

possession and in a suit for mesne profits may necessarily be identical. I find therefore, that by the application of the above-said test also it would be manifest that the two causes of action are distinct and separate.

(9) The above-mentioned view that I am inclined to take is amply fortified by the decision of the Court of Appeal in *Brusden* v. *Humphrey* (3). Therein the plaintiff whilst driving his cab came into collusion with the van of the defendant through the negligence of the latter's servant. In the accident the cab was damaged Band the plaintiff also sustained bodily injury. He first sued the defendant for damage to his cab and recovered some amount therefor. Afterwards he brought an action in the High Court claiming damages for personal injuries sustained. Brett, M. R. upholding his claim observed as follows:—

> "* * * Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action. I do not decide this case on the ground of any test which may be considered applicable to it; but I may mention one of them; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case. In the action brought in the county court, in order to support the plaintiff's case, it would be necessary to give evidence of the damage done to the plaintiff's vehicle. In the present action it would be necessary to give evidence of the bodily injury occasioned to the plaintiff and of the sufferings which he has undergone, and for this purpose to call medical witnesses. This one test shows that the causes of action as to the damage done to the plaintiff's cab, and as to the injury occasioned to the plaintiff's person, are distinct. Therefore; we are not now called upon to apply a legal maxim the application of which ought not to be stretched. The plaintiff is entitled to recover the sum of £ 350, awarded by the jury. Two actions may be brought in respect of the same facts, where those facts give rise to two distinct causes of action." ...

(10) Inevitably, one must now turn to the relevant provisions of the statute and the scheme in which these are laid in Order II

(3) (1885) 14 Q.B.D. 141.

of the Civil Procedure Code. For facility of reference, these may first be set down:

"Order II

Frame of Suit

R. 1. Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

2(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except wtih the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. ...

Explanation: * * * * *.

Illustration: * * * * *.

3. *Joinder of causes of action*: * * * *.

4. No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property except— ... .

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action: ... ...

Provided: * * * * *."

It is indeed unnecessary to dilate at length about the objects and the purposes underlying rule 2 above-quoted. It has been authoritatively

held that the provision is plainly directed against the twin evils of the splitting up of claims and splitting up of remedies. It is obviously intended to avoid a multiplicity of actions. However, even a plain reading of the rule makes it evident that it is intended clearly to apply only to a claim based on one cause of action. It does not bar the bringing of a second suit if it is based on a distinct and separate cause of action. It is elementary that, except where a statutory provision provides otherwise, two suits may be brought upon facts which give rise to two distinct causes of action. In order to attract the application of rule 2, the previous suit as well as the subsequent suit must arise out of a single and indivisible cause of action and secondly the suit must be substantially between the same parties.

(11) Now, it is an elementary canon of construction that the provisions of a statute are to be read harmoniously and an interpretation is to be avoided which may render any part thereof otiose. Applying this salutary principle, the provisions of rule 2 and rule 4 above quoted must be construed as complementary to each other. Now, the very opening words of rule 4 are a clear pointer to the fact that this provision treats a claim for the recovery of immovable property and a claim for mesne profits thereof as two distinct and separate causes of action. This is so because that could be the only reason why rule 4 abovesaid has to especially provide for joining a claim for mesne profits with a claim for the recovery of immovable property. Indeed, if the two claims were a single indivisible cause of action, then no necessity for a provision like sub-clause (a) of rule 4 would arise and such a construction would render this provision wholly redundant and otiose. On the other hand, but for the provision of rule 4(a) which provides an express exception, the general prohibition of joining any other cause of action with a suit for recovery of immovable property would come into operation even in cases where the two claims were to be made. It is merely an enabling provision which allows the joinder of these two causes of action. The conclusion, therefore, which inevitably seems to flow from reading rule 2 and rule 4 together is that Order 2 treats a cause of action for recovery of immovable property as distinct from a cause of action for the mesne profits thereof.

(12) A reference to analogous statutes again reinforces the view that the two causes of action are treated as distinct and separate. The Limitation Act of 1908 which was promulgated in the very year in which the present Civil Procedure Code came into force

provided by Article 109 thereof (corresponding to Article 51 of the Limitation Act of 1963) that the limitation for suing for mesne profits was 3 years from the date when the profits were received. In sharp contrast thereto, Articles 136 to 138, 140 to 142 and 144 of the said Act (corresponding to Articles 64 and 65 of the Limitation Act of 1963) provided a limitation of 12 years for a suit for the recovery of possession of immovable property. It is manifest therefore, that the periods of limitation as also the *terminus a quo* for a suit for mesne profits and a suit for the recovery of possession of immovable property are both substantially different. If both these causes of action were one and indivisible, this could possibly not be so. It so only because the statute treats the two causes of action as patently separate from each other. As is well known, mesne profits accrue from day to day and the cause of action in such a case, therefore, would be a continuing one and arising out of the continued misappropriation of the profits, actual or constructive, to which the plaintiff is entitled at law. On the other hand in a suit for recovery of immovable property the *terminus* is always a fixed one from either the alleged date of dispossesion or when the possession of the defendant becomes adverse to the plaintiff. The procedural limitation statutes, therefore, again buttress the view that mesne profits on the one hand and suit for the recovery of immovable property have been accepted to be distinct cause of action.

(13) The above-quoted provisions of the Limitation Act also bring into sharp relief what is otherwise equally evident on principle. A wrongful dispossession of immovable property or a continuance in adverse possession thereof is by itself an independent wrongful act. This would *per se* give rise to a cause of action to the plaintiff. If thereafter the person in wrongful possession continues to deprive the rightful owner of the usufruct of the said property either actual or constructive he commits a second and independent wrongful act thus giving rise to another distinct cause of action. Hence a wrongful dispossession of immovable property can be and in fact is distinct and separate from the wrongful deprival of the usufruct thereof to its owner. As has been authoritatively said there is no reason on principle why a plaintiff, if so inclined, may not acquiesce in the wrong of dispossession for sometime till he chooses to recover the same (subject to a limitation of 12 years) and yet claim from time to time (within the three years period of limitation) the

profits of the land whilst it remains in the wrongful occupation of the defendant.

(14) The stage is now set for the examination of the authorities and the existing conflict therein. The basic reliance of Mr. K. L. Aggarwal on behalf of the appellants is on the Full Bench judgment reported as *Laljimal and another* v. *Hulasi and another* (4). There is no gain saying the fact that the conclusion arrived at in the said case would lend support to the proposition advanced by the counsel for the appellants. With the greatest deference, however, it has to be noticed that the issue was probably not exhaustively agitated before the Bench. The matter appears to have been treated as one of first impression. Brief judgments each running hardly into a single short paragraph were separately recorded by Straight, J., and Spankie, J. Even here it appears to me that the Bench did not arrive at any conclusive finding that the causes of action for mesne profits and that for the recovery of immovable property are identical or indivisible. On the contrary it was in terms opined that the two causes of action again could be distinct and separate and this is manifest from the following observations of Justice Straight—

> "It may well be that in some cases a claim of mesne profits would, as contemplated by section 44 of Act X of 1877 (corresponding to Order 2 rule 4 of the present Code) amount to a cause of action distinct from that on which a suit for the recovery of immovable property or for declaration of right to immovable property might be founded."

After making the above-said observations, however, the learned Judge found that on the peculiar facts of the case the possession and mesne profits were so mixed up and involved with one and the same common cause, namely, the non-delivery of possession in a suit for specific performance of the contract of mortgage, that they must be taken as constituting the whole claim the plaintiffs were entitled to make in respect of the same. It is possible, therefore, to construe this judgment as peculiar to the facts upon which it was founded.

(15) Once the above-quoted judgment was rendered it was naturally followed within the Allahabad High Court and Mr. Aggarwal's reliance on *Mewa Kaur* v. *Banarsi Prasad* (5), which is

(4) I.L.R. 3 Allahabad 661.

(5) I.L.R. 17 Allahabad 533.

a Division Bench case, does not in any way add to the argument on his behalf. However, it is instructive to notice that even here, Chief Justice Edge and Banerji, J., had this to say:—

> "* * * It is possible that there may be a case in which a party would be entitled to claim recovery of immovable property and to claim mesne profits in respect of that property in which the cause of action might not be the same, and it may have been to provide for such a case as that, that clause (a) of section 44 was inserted in that section. Such a case does not present itself to our minds. We cannot say that such a case has not arisen."

(16) Whatever aid the above-said two cases may give to the argument on behalf of the appellant, the same appears to be substantially eroded by the weighty observations of Acting Chief Justice Sulaiman speaking for the Special Bench in *B. Ram Karan Singh and others* v. *Nakchhad Ahir and others* (6). In this case the claim for mesne profits related to the period between the institution of the first suit for possession and the actual date on which the possession was obtained. It was resisted on the identical ground of the bar of Order 2 rule 2, Civil Procedure Code. In following the claim Sulaiman A.C.J., observed:—

> "It seems to us that the cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits. The provisions of Order 2 rule 4 indicate that the legislature thought it necessary to provide especially for joining a claim for mesne profits with one for recovery of possession of immovable property and that but for such an express provision such a combination might well have been disallowed. A suit for possession can be brought within twelve years of the date when the original dispossession took place and the cause of action for recovery of possession accrued. The claim for mesne profits can only be brought in respect of profits within three years of the institution of the suit and the date of the cause of action for mesne profits would in many cases be not identical with the original date of the cause of action for the recovery of possession."

(6) A.I.R. 1931 All. 429.

It is thus manifest that within the Allahabad High Court also there is a clash of opinion and in the latest Special Bench decision brought to our notice the weighty observations of Acting Chief Justice Sulaiman indeed tend to favour the view canvassed on behalf of the respondents.

(17) Within the Bombay High Court reliance is sought to be placed on a Division Bench judgment of Beaumont C.J. and Sen, J. reported as *Channappa Girimalappa Jolad* v. *Bagalkot Bank* (7). The facts there were slightly peculiar in so far as the claim for possession was based on the alleged wrongful alienation of immovable property by the adoptive mother of the plaintiff. Though the learned Chief Justice held that a second suit for mesne profits was barred because it has not been included in a previous suit for possession of the property he expressly noticed the conflict within the Court because in *Ramchandra* v. *Lodha* (8), it had been in terms held that a claim for possession of the immovable property was not founded on the same cause of action as a claim for mesne profits in respect of that property, Chief Justice Beaument found some conflict in the earlier view of the Court and the subsequent decision in *Naba Kumar* v. *Radhashyam* (9), (to which judgment detailed reference would be made hereafter) but ultimately seems to have rested his decision on the peculiar facts of the case with the following observations:—

> "* * *. It is, I think, difficult to reconcile *Ramchandra* v. *Lodha* (8), with that opinion of the Privy Council. But in this case there was something more in the former suit than the claim for possession, because an issue was raised as to whether Irawa had a life interest in the property. Directly the Court, held that she had not got a life interest in the property, it manifestly became possible for the plaintiff, on exactly the same facts and law as he had relied on for challenging the life interest, to claim the rents and profits received by the defendant in respect of that life interest. In my opinion, it is clear that in this case a claim for rents and profits could have been made on the same cause of action as that on which the 1933 suit was founded."

(7) A.I.R. 1942 Bm. 338
(8) A.I.R. 1924 Bom. 368.
(9) A.I.R. 1931 P.C. 229.

It appears from the above that the matter was tilted to one side not so much on an issue of principle as upon the pecularity of the facts in that case.

(18) Mr. Aggarwal had also placed some semblance of reliance on the Single Bench judgment in *Dwarkadas Nathamal* v *Vimal* (10). I am, however of the view that it is completely wide of the mark. Therein there was no issue of any earlier suit for the recovery of possession and a subsequent one for a claim to mesne profits. The problem was posed merely by the fact that the plaintiff had brought a suit in 1954, for recovery of mesne profits for the year, 1951, which was decreed in his favour in 1955. The plaintiff then brought a second suit in March, 1955, for recovery of mesne profits for the years 1952-53 against the same defendants which was rightly held to be barred. This decision seems hardly relevant to the present issue.

(19) As regards the predecessor Courts of this High Court the Judgment cited in *Ganga Ram and others* v. *Abdul Rahman and others* (11), seems equally wide of the mark because it relates to the competency of a mortgagee to institute a separate suit for principal and interest when both had fallen due. The above-said judgment was naturally followed in *Chaudhri Kundan Mal and others* v. *Sardar Allah Dad Khan and others* (12), which again was a case of a mortgagee suing only for interest due and not for principal thereof after the date of the expiry of the mortgage term Obviously this also is hardly relevant. Same can well be said of *Malik Karim Bakhsh and others* v. *Jattu Ram* (13). Here it deserves pointed notice that the point at issue is directly covered by the Full Bench judgment in *Raja Bikrama Singh of Faridkot* v. *Prab Dial and three others* (14), in favour of the respondents and the observations in Division Benches or Single Benches contrary to that view are entitled to little weight and, therefore, do not merit either distinguishing or reputation individually.

(20) The solitary judgment of the Madras High Court referred to on behalf of the appellants is *Venkoba* v. Subbanna (15). There is

(10) A.I.R. 1964 Bom. 42.
(11) 28 P.R. 1907.
(12) 19 P.R. 1910.
(13) 31 P.R. 1910.
(14) 129 P.R. 1889.
(15) (1888) 11 I.L.R. Mad. 151.

hardly any discussion in the short order, which was merely an acceptance of a reference from the Court below. These observations are directly contrary to the subsequent authoritative Full Bench judgment of the Madras High Court, to which reference is made hereafter.

(21) As against the above-said decision there is a string of consistent judicial opinion which decisively favours the contrary view canvassed on behalf of the respondents. Inevitably reference must first be made to the Full Bench decision *Raja Bikrama Singh's* case (14), which has held undisputed sway within this jurisdiction for well-nigha century. No decision directly contrary to its ratio within this Court has been cited. *In Raja Bikrama Singh's case* (14) the point at issue was formulated for consideration on a reference to the larger Bench by Plowden J. The unanimous opinion rendered by the Full Bench was that a second suit was not barred by the analyogous provisions of sections 42 and 43 of the Civil Procedure Code of 1877, which were then in force. Plowden J., pithily observed—

> "* * * . On the view we adopt, ejecting a person from immovable property in his possession, and thereafter preventing the person entitled to the profits of immovable property from enjoying them are not the same cause of action, but distinct causes of action, being separate wrongful acts. On principle, we see no reason why a plaintiff should not, if so disposed, acquiesce in the wrong of dispossession and leave the land with the defendant till he choses to recover it (subject to the law of limitation), and yet claim from time to time the profits of the land while in the occupation of the defendant."

(22) In the Madras High Court, the earlier case cited is that of Triupati and others v. Narasimha, (1888) I.L.R. 11 Mad. 210. There the Division Bench concluded as follows:—

> "* *. We are of the opinion that the suit to recover mesne profits and the suit to eject are not parts of a claim founded on the identical cause of action within the meaning of section 43, and that if mesne profits are alone claimed in the first suit as damages due for adverse occupancy, a second suit can be maintained to recover possession of the land."

The authoritative pronouncement, however, is the Full Bench decision in *Ponnammal* v. *Ramamirda Aiyar and others* (16), which has been consistently followed thereafter in the Madras High Court and has been accepted as authoritative in other jurisdictions as well. It was categorically held therein that where a plaintiff sued for possesion of lands only when he might have joined in the same action claims for mesne profits and damages, it was still open to him to bring a subsequent suit against the same defendants for the profits which became payable before the institution of the former suit and which might have been included in that suit. For the reiteration of the above-said ratio reference in passing may be made to *Venugonal Pillai and others* v. *Thiruqnanavalli Ammal* (17) and *Tadepalli Ramiah* v. *Madala Thathiah and another* (18).

(23) Within the Calcutta High Court an identical view has prevailed for more than a century by now. In *Protap Chunder Burooah* v. *Ranee Surno Moyee* (19), it was held relying even on an earlier Full Bench decision of the Court that a regular suit for mesne profits would lie even after a suit for possession, if in that suit no question of mesne profits was raised or decided. An authoritative decision, however, later is that of the Full Bench in *Kishori Lal Roy* v. *Sharut Chunder Mozumdar* (20), in which Garth C. J. speaking for a Bench of five Judges observed that the accepted law within the Court was to allow a plaintiff to enforce a claim for possession of land and for mesne profits either in one suit or two as he may think proper. This judgment was expressly followed in *Lalesor Babui and others* v. *Janki Bibi* (21). A relatively recent judgment showing the consistent trend is that of *Sris Chandra Nandy* v. *Joyramdanga Coal Concern Ltd.* (22).

(24) In the Bombay High Court a Division Bench in *Ramchandra Adaram Agarwale* v. *Lodha Gouri Bhadbbunji* (8), expressly referred to and followed the view taken by the Madras Full Bench in *Ponnammal's case* (16) (supra).

(16) (1915) I.L.R. 38 Mad. 829.
(17) A.I.R. 1940 Mad. 934.
(18) A.I.R. 1937 Mad. 849.
(19) 1869 W.R. 5.
(20) I.L.R. 8 Cal. 593.
(21) I.L.R. 19 Cal. 615.
(22) A.I.R. 1942 Cal. 40.

(25) In *Ma Myaing and another* v. *Mg. B. Chit and others* (23) the conflict of decision with the Allahabad High Court was noticed by the Bench and it opined that the ratio of the Full Bench *in Ponnammal's case* (16) followed by the Bombay decison quoted above laid down a sounder rule of law, and followed the same.

(26) In the Andhra Pradesh High Court a relatively recent Division Bench Judgment reported as *Abburi Rangamma* v. *Chitrapu Venupurnachandra Rao and others* (24), has exhaustively considered the matter both on principle and authority and then held that the cause of action for recovery of immovable property is distinct from that of mesne profits and hence a second suit claiming the same would not be barred by Order 2 rule 2 of the Civil Procedure Code.

(27) The only judgment of the Patna High Court cited before us is the Division Bench case of *Loknath Singh* v. *Dwarika Singh* (25), which is directly on the point and the learned Judges therein have expressly preferred to follow the Madras view laid by the Full Bench in *Ponammal's case.*

(28) It is manifest from the above resume of authority that there is an overwhelming weight of precedent in favour of the view canvassed on behalf of the respondents in the Punjab, Calcutta, Madras, Patna, Andhra Pradesh and Rangoon High Courts. There appears to be apparent conflict of authority within the Allahabad High Court itself, but the subsequent Special Bench judgment in *B. Ram Karan Singh's case* (6) (supra) is consistent with the above-said string of authorities. From the cases cited before us it appears that some conflict enure within the Bombay High Court which has not been finally resolved.

(29) The high authority of the Privy Council has been invoked on behalf of the appellants and it remains to examine this contention. As a last resort Mr. Aggarwal had argued that the ratio or *Naba Kumar Hazra and another* v. *Radhashyam Mahish and others* (9), is applicable and that case has overruled the consistent string of authorities to which a reference has been made above. I am wholly unable to agree. The above-mentioned case was the aftermath of the earlier decision reported as *Nagendrabale Dasi and*

(23) A.I.R. 1926 Rangoon 137.
(24) A.I.R. 1966 A.P. 325.
(25) A.I.R. 1931 Patna 233.

another v. *Dinanath Mahish and others* (26). A reference to the two judgments would show that the facts therein were indeed tangled. A close reading exhibits that a pleader who was appearing for the judgment-debtors in a mortgage suit had the decree in the said suit purchased *benami* in the name of his wife. He later began to execute the same but the judgment-debtors having come to know of the said fact filed a suit to have it declared that it was really a *benami* and a fraudulent purchase for and on behalf of the pleader, who was the real purchaser. The plaintiffs, therefore, claimed appropriate relief in that action. During the pendency of the suit the property was sold and the wife of the pleader was allowed to purchase a part of the same and in consequence thereof necessary amendments were permitted to be made in the plaint by which the plaintiffs further laid claim to a reconveyance of the decree, as also the said property. The plaintiffs, suit was decreed and it was ordered that re-conveyance of the decree be made in favour of the plaintiffs conditional on their paying a sum of Rs. 13,750 only. On appeal the High Court not only affirmed this part of the judgment, but further ordered that the two defendants must also convey the properties purchased by the female defendant (i.e., the wife of male defendant) during the course of the execution proceedings of the decree. The Privy Council upheld this judgment of the High Court by their decision in *Nagendrabala Dasi's case* (26).

(30) Subsequently some of the judgment-debtors instituted a fresh suit upon the allegation that after the execution sale of the properties in question the purchasers thereof were for sometime in receipt of rents and profits for which they had not accounted. The relevant claim in the plaint was for account and payment. The trial Court held that the suit was barred by principles of res-judicata. However, the High Court took a contrary view holding that the facts gave rise to no question of res-judicata. On appeal their Lordships of the Privy Council in *Nabha Kumar Hazra's case* (9), held that without expressing and opinion on the point of res-judicata they were of the view that the suits of the plaintiffs were plainly barred by Order 2, rule 3 of the Civil Procedure Code.

(31) It is plain from the above-quoted facts that in the latter case there was no question or issue of any claim for mesne profits.

(26) A.I.R. 1924 P.C. 34.

Particular relief sought was only for account and payment. Equally manifest it is that no issue of any previous or subsequent suit for possession of immovable property arose. Their Lordships of the Privy Council did not even remotely construe or treat the cause of action in the case as one for mesne profits. They made no reference to the long string of authoritative precedent on the point because it did not in terms arise. Similarly as the specific provisions of Order 2 rule 4 of the Civil Procedure Code were not at all attracted, therefore, no reference was made to them. An analytical reading of the judgment would show that there is nothing therein to indicate that the Privy Council intended to depart from the settled principle (recognised both in Indian and English law) that an action for mesne profits and an action for recovery of immovable property were founded on distinct causes of action and to overrule the large body of consistent case law on the point.

(32) In the above context what is particularly worthy of notice is the fact that the distinguished jurist Sir Dinshah Mulla was himself a party to the judgment in *Naba Kumar Hazra's case*. In his authoritative commentary on the Civil Procedure Code Sir Dinshah Mulla later did not even remotely treat the said decision as laying down a contrary view from that taken by the large majority of the High Courts on this point to which reference has been made above. I am, therefore, of the view that the Privy Council case does not cover the point at issue either directly or by way of analogy and it is, therefore, of no aid to the appellant.

(33) In this context it also deserves mention that similar arguments based on *Naba Kumar Hazra and other's case* were raised before the Division Benches in *Tadepalli Ramiah* v. *Madala Thathiah and another* (18) *Venugopal Pillai and other* v. *Thirugnanavalli Ammal* (17), *Abburi Rangamma* v. *Chitrapu Venupurnachandra Rao and others* (24) and *Raj Wards Estate* v. *Joyramdanga Coal Concern Ltd.* (22), and were repelled for detailed reasons recorded therein. No useful purpose would be served in traversing the same ground again and it suffices to mention that I am in entire agreement with the reasoning given in the above-said judgments for distinguishing the Privy Council case.

(34) Two more matters remain to be adverted to ere I close this judgment. Firstly it appears that the construction advocated on behalf of the appellants, namely, that the two causes of action are

in fact a single indivisible cause would lead to anomalies, to hardship and if I may say so with the greatest respect to illogicality. This is patent if the argument is carried to its extreme in order to test its validity and to my mind a case illustrative of this fact is one reported as *Saghir Hassan* v. *Tayab Hasan* (27). Therein in conclusion it has been obsedved as follow:—

> "In our judgment if a person is wrongfully kept out of possession of immovable property he is entitled to sue for possession and for mesne profits and under the provisions of Order 2, rule 2(3) he is bound to include both claims in one suit. If he sues only for mesne profits he cannot in a subsequent suit sue separately for possession. In other words he is no longer entitled to possession; and if he is not entitled to possession he is not entitled to mesne profits."

With the greatest deference to the learned judges I would beg to differ from the above-said view and it appears to me that thereby mere technicalities of procedure have been elongated to an extent so as to erode even the substantive rights of possession to property. On the above-said opinion if an unfortunate litigant under some misapprehension or wrong advice or perhaps due to financial disability (for sustaining a suit for possession) sues for mesne profits in the first instance and omits or fails to sue for possession of the property at the same time then subsequently even his substantive right to recover his own immovable and valuable property against a mere trespasser would become barred. The end-result, therefore, would be that a valuable substantive right to property would be lost by a mere procedural error or disability. Such a situation has necessarily to be avoided unless, of course, it is the only and inevitable rule deducible from the unequivocal provisions of a statute. This is certainly not the case here. At the highest what can possibly be said for the appellant is that two views are perhaps possible on the relevant provisions of Order 2 rules 2 and 4, Civil Procedure Code. As I have already pointed out above a very large number of illustrious judges have taken a contrary view which is clearly in favour of that canvassed by the respondent. Now it is a settled rule of construction that where two interpretations of a statutory provision are possible then one which tends to mere technicality causes unnecessary hardship, erodes substantive rights,

(27) A.I.R. 1940 All. 524.

and denies a trial on merits, is naturally to be avoided. On this larger and equitable consideration also it appears to me that the construction that a cause of action for mesne profit is separate and distinct from a cause of action for recovery of immovable property is to be distinctly preferred.

(35) Lastly I am inclined to the view that within this particular jurisdiction the rule of *stare decisis* also prevents any construction other than that advocated on behalf of the respondents. This is so because for nearly a century since 1889 the rule laid down by the Full Bench in *Raja Bikrama Singh of Faridkot's case* (14) has held unmistakable sway both in the Lahore High Court and thereafter in this successor Court. Chief Justice Bhandari in *Municipal Committee, Delhi* v. *Janki Das Jagan Nath* (28) had occasion to observe that it must be remembered that this Court is a successor and a continuation of the Court at Lahore and the decisions of that Court ought to be followed in the application of the principle of *stare decisis*, unless those decisions are manifestly erroneous. The same result flows by way of analogy from the more authoritative pronouncement of their Lordships of the Supreme Court in *Maktul* v. *Mst. Manbhari and others* (29). It deserves pointed mention that even the learned counsel for the appellants had conceded that no view even remotely contrary to or dissenting from the ratio in *Raja Bikrama Singh's case* (14), has ever been voiced either in the Lahore High Court or in this Court. Now, as a matter of abundant caution, even if any such dissent exists (though none has been brought to our notice) it would not even remotely detract from the weight of the ratio in *Raja Bikrama Singh's case* (14) in view of the forthright opinion of their Lordships in *Jai Kaur and others* v. *Sher Singh and others* (30), in the following terms:

> "It is true that they did not say in so many words that these cases were wrongly decided; but when a Full Bench decides a question in a particular way every previous decision which had answered the same question in a different way cannot but be held to have been wrongly decided."

It is manifest, therefore, that a view of the law which is also in consonance with the massive weight of precedents in innumerable

(28) A.I.R. 1954 Pb. 173.
(29) A.I.R. 1958 S.C. 918.
(30) A.I.R. 1960 S.C. 1118.

other High Courts and which has been followed within this jurisdiction for nearly a hundred years is, therefore, not capable of being easily disturbed. Their Lordships of the Supreme Court have repeatedly reiterated that even Benches of co-equal jurisdiction are binding upon each other. Unless there is cause to differ—in the present case far from it being so I am indeed wholly in agreement—the ratio in *Raja Bikrama Singh's case* is a binding one and no cause has been shown to us to disturb the consistency and the continuity of a rule which has held the field for all this while.

(36) I conclude, therefore, that in the light of the legislative history; on an examination of principle; considering the specific provisions of the relevant statute, taking in view the massive weight of precedent; no option exists but to answer the legal question (formulated in the opening part of the judgment) in the negative.

(37) In view of my above-said opinion on the only issue of law raised, the same is hereby decided against the appellants. The appeal is hereby dismissed but in view of the intricate point of law involved, I propose no order as to costs.

M. L. Verma, J.—I agree with the view by my learned brother S. S. Sandhawalia, J.

Gujral, J.—I have had the advantage of reading the judgment of my learned brother S. S. Sandhawalia, J., but with utmost respect for my learned brother I have been unable to persuade myself that the interpretation sought to be placed on Order 2, rule 2, Code of Civil Procedure, is in accordance with the true intent and scope of this provision especially if order 2, rule 2, is explained in the light of the other provisions contained in Order 2, rule 1, and Order 2, rule 4.

(40) The facts necessary for the decision of the only issue in this case are not in dispute and having been set out in the judgment of my learned brother bear no repetition. It would suffice to mention that in the earlier suit which was for possession of the property and was filed on the basis that the defendants were in wrongful and unauthorised occupation, a claim for mesne profits till the date of the institution of the suit had not been included and that subsequently a separate suit for the recovery of the mesne profits was filed.

This suit was contested on various grounds including the two which led to the following issues:—

(1) Whether the trial of the suit cannot be proceeded with in view of the provisions of section 10, Civil Procedure Code?

(2) Whether the suit is barred under Order 2, rule 2 of the Code of Civil Procedure as alleged in para 2 of the preliminary objections in the written statement?

Both the issues were decided against the plaintiffs by the trial Court but in appeal the learned Judge reversed the finding on issue No. 2. It is this decision which is the subject-matter of the present appeal.

Whether the second suit is barred in view of the provisions of Order 2, rule 2, Civil Procedure Code, is the problem with which we are faced. In order to appreciate the relevant contentions, it would be appropriate to examine the provisions of Order 2, rules 1, 2 and 4 and for facility of reference they are set down below.

"(1) Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subject in dispute and to prevent further litigation concerning them.

2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinguish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or reliquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for the reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive

claims arising under the same obligation shall be deemed respectively to constitute, but one cause of action.

4. No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except—

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof:

(b) claims for damages for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property."

A bare perusal of the above provisions would show that clue to the problem is contained in the expression "cause of action" in the sense that if a claim for possession of the property and a claim for mesne profits arising therefrom are considered distinct and separate cause of action, then a subsequent suit is not barred, but if they are considered one cause of action the suit would be barred.

(41) The expression "cause of action" has not been put into the straight-jacket of a precise or even a general definition either in the Code of Civil Procedure or any other statute. It is accepted that the term "cause of action" is of a varying and doubtful meaning and because of its finer shades, it is not easy to put the concept in a steel frame. Over the past decades efforts have, however, been made by eminent judges and jurists to lay down the guidelines for appreciating the true meaning of this expression. Relying on the observations in *Read* v. *Brown* (1), the Privy Council in *Mohammad Khalil Khan and others v. Mahbub Ali Mian and others* (2), broadly defined "cause of action" as every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment. The following principles were deduced from the case law:—

"(1) The correct test in cases falling under 0.2, R. 2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit."

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

(3) If the evidence to support the two claims is different, then the causes of action are also different.

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers..... to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

It was further observed that where the facts which would entitle the plaintiffs' in their new suit to recover property to establish their title are substantially the same as those alleged in their former suit to recover property X, the causes of action in the two suits are identical and the plaintiffs are barred by reason of Order 2, rule 2, from maintaining the new suit.

(42) While proceeding to consider, in the light of the above observations, whether a claim for mesne profits and a claim for possession arise out of the same cause of action or not, it would be pertinent to examine the definition of mesne profits contained in section 2(12) of the Civil Procedure Code. The definition is as follows:—

"2(12) "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:"

In the Code of Civil Procedure, 1859, the relevant provisions were sections 7 to 10. Section 7 provided that every suit shall include the whole of the claim arising out of the cause of action. It was further provided that if the plaintiff relinquishes or omits to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not be entertained afterwards. Section and section 10 provides as follows:—

"10. A claim for the recovery of land and a claim for the mesne profits of such land shall be deemed to be distinct causes

of action within the meaning of the two last preceding sections."

In view of the above provision, a claim for recovery of land and a claim for mesne profits of such land were treated as distinct causes of action. The implication of this is that, but for the deeming provision contained in section 10 the two claims would be considered to have arisen out of one and the same cause of action and as it was intended that these claims should be treated as distinct causes of action a deeming provision had to be introduced. The argument that the framers of the Indian Code of Civil Procedure, 1859, accepted the concept that a claim for recovery of land and a claim for mesne profits were distinct causes of action is obviously fallacious, as in that case there was no occasion to introduce the deeming provision as contained in section 10.

(43) Leaving the historical aspect apart, even if the test whether the evidence to support the two claims is the same or different is applied, in my opinion the plausible conclusion would be that a claim for possession of property and a claim for mesne profits thereof from one cause of action. In a suit for possession of property in order to succeed, the plaintiff would have to prove his title to the property and the fact that he had been in possession within twelve years of the filing of the suit. In a suit for mesne profits, besides proving these facts the plaintiff would have to prove the period during which the defendant had been illegally in possession of such property had received or might with ordinary diligence have received therefrom. It would, therefore, appear that the material part of the evidence is the same. In fact, unless the plaintiff can establish his claim for possession, a claim for mesne profits would not arise. If the view taken is that the evidence in the two cases must be wholly identical and not only substantially so, even a claim for mesne profits for subsequent years would not bar a claim for earlier period, as in the former suit the plaintiff would have to prove the profits which would or could have been earned during the particular period while in the latter suit the profits for a different period would have to be established. It is, however not disputed that mesne profits for an earlier period cannot be claimed in a subsequent suit where earlier, mesne profits for a subsequent period had been claimed. The true test would, therefore, be that the evidence in the two suits should substantially be the same and applying this

test I find that the plaintiff, in order to establish his claim for mesne profits, would lead substantially the same evidence which he would have to in order to succeed in a suit for possession against a person in wrongful possession. The only additional fact which he would have to prove could be in respect of the quantum of the mesne profits involved.

(44) The stage is now set for examining the second argument advanced on behalf of the respondent which is based on rule 4 of Order 2. The precise argument is that rule 4 envisages that a claim for recovery of immovable property and a claim for mesne profits thereof are two distinct and separate causes of action. It is asserted that if a claim for mesne profits and a claim for recovery of immovable property are treated as a single cause of action, sub-rule (a) of rule 4 would become redundant.

(45) The above argument, no doubt on first impression, does appear attractive, but a close examination of rule 4 would highlight the hollowness of this contention. It appears that the expression "cause of action" in Order 2, rule 4, has been used not in the sense it is used in Order 2, rule 2, but in a different context. A reference to clause (c) of rule 4 would support such an argument. Ignoring clauses (a) and (b) of rule 4 for the present, the relevant portion of rule 4 would read as follows :—

> "No cause of action shall..... be joined with a suit for the recovery of immovable property except—claims in which the relief sought is based on the same cause of action."

According to this clause, claims arising out of a cause of action can be joined with a suit for the recovery of immovable property if the cause of action is the same, out of which the claims as well as the suit for the recovery of immovable property arise. The cause of action being one, no question of joining a cause of action with a suit for the recovery of immovable property would in this situation arise and, viewed in this context, so far as clause (c) of rule 4 is concerned, the opening part of rule 4 would be redundant. In case the claim to which reference is made in clause (c) of rule 4 is based on the same cause of action on which a suit for the recovery of immovable property is based, the two claims would have to be joined in the same

suit in view of the provisions of rule 2 of Order 2 and no leave of the Court would be necessary. The only harmonious way in which rule 4(c) can be read is if the expression "cause of action" occurring in the opening line of rule 4 is taken imply "claim" and the rule is read to mean that no claim shall be joined with a suit for the recovery of immovable property except claims in which the relief sought is based on the same cause of action.

(46) Even if clause (a) of rule 4 of Order 2 is closely examined, it would not support the contention that it envisages that a cause of action for the recovery of immovable property is distinct from the cause of action for mesne profits thereof. All that rule 4(a) provides is that a claim for the recovery of immovable property and a claim for mesne profits or arrears of rent in respect of that property or any part thereof can be joined in one suit without the leave of the Court. In case it was intended that a claim for mesne profits or arrears of rent be treated as a separate cause of action, clause (a) would have read as "cause of action giving rise to claim for mesne profits or arrears of rent in respect of the property claim or any part thereof." As a single cause of action can give rise to numerous claims, it cannot be plausibly urged that claims for mesne profits and arrears of rent in clause (a) of rule 4 should be treated as if arising from a different cause of action from the one from which a suit for the recovery of immovable property arises. This rule provides that no cause of action shall be joined with a suit for the recovery of immovable property except claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof unless the leave of the Court has been obtained but it does not necessarily carry an implication that a claim for mesne profits and a claim for possession of immovable property amount to separate and distinct causes of action. Having regard to the language of clause (c) of rule 4 of Order 2, it can be plausibly urged that clauses (a) and (c) are not really exceptions but are merely explanations of the rule embodied in rule 2 of Order 2.

(47) It would be pertinent to examine another argument at this stage. It is contended that as the period of limitation for a suit for mesne profits was different from the period of limitation provided for a suit for the recovery of possession of immovable property, it could

be inferred that the Limitation Act treats these causes of action as distinct and separate from each other. To me the argument appears to be devoid of the merit of plausibility. The starting point of limitation for both the claims would be the same, inasmuch as the moment the plaintiff is illegally dispossessed, he is entitled to recover possession as well as the mesne profits for the period during which he remains dispossessed. The fact that a suit for the recovery of possession of immovable property can be brought within twelve years while a suit for mesne profits would have to be brought every three years is of no consequence for determining whether the two claims are based on distinct causes of action or on the same cause of action. A single cause of action may entitle a person to more than one reliefs and it could often happen that limitation for all these reliefs may not be the same, but that circumstances would not carry the implication that these reliefs have arisen out of different causes of action. To quote an example, a Government servant who is wrongfully dismissed may be entitled to a number of reliefs arising out of this cause of action including relief of reinstatement, back wages and promotion, etc., but the period of limitation for all these reliefs would not be the same even though they arise out of the same cause of action. Having examined the various arguments advanced on either side, the stage is now set for considering the case-law on the subject. It would be pertinent to observe at the outset that there is a sharp conflict of opinion as to whether a suit for possession of immovable property and a suit for mesne profits arise out of the same cause of action or are based on different causes of action. The High Courts of Madras, Calcutta and Bombay have taken the view that a suit for possession does not bar a suit for mesne profits accrued before the first suit, as the second suit is based on a cause of action different from that of the first suit. A contrary view has been taken by the High Courts of Allahabad, Oudh, Madhya Bharat, Peshawar and Sind, and in some of the decisions of the Calcutta, Bobmay and Orissa High Courts. In earlier cases, the Lahore High Court also accepted the view of the Calcutta and Madras High Courts as laying down the correct law. As the decision in these cases was not in accordance with the ratio of the decision of the Privy Council in *Naba Kumar Hazara and another* v. *Radhashyam Mahish anothers* (9) the view of the Madras, Calcutta and Lahore High Courts was not followed by the other High Courts after the decision of the Privy Council in *Naba Kumar Hazara's case.*

(48) Before proceeding to examine the other case-law, it would be appropriate to consider in detail the ratio of the decision in *Naba Kumar's* case and to examine the rival contentions whether it has or has not any bearing on the question that confronts us. The litigation giving rise to this appeal before the Privy Council had a long-drawn history and the case was a sequel of a case which had earlier come before the Privy Council in *Nagendrabala Dasi* v. *Dinanath Mahish* (26). It is not necessary to make a reference to the detailed facts and it would suffice to mention that as a result of the earlier case a pleader was held to be trustee for the mortgagors of the mortgaged property and also certain properties which he had purchased at a sale in execution of the decree in the name of his wife. He was ordered to transfer the decree and property to one set of mortgagor who were the plaintiffs in the suit on certain terms and conditions, with which we are not concerned. Subsequently two more suits were filed. One of these was instituted by the mortgagor plaintiff in the former suit. Initially the suit was filed for declaratory relief but subsequently the plaint was amended and assignment of the mortgage decree was prayed for. In the High Court in appeal, a prayer for the conveyance of the properties with necessary accounts was made. The High Court varied the decree and directed that the property should also be conveyed to the respondents but made no order for accounts. The claim for accounts was not pressed any further and the High Court's decree was affirmed by the Privy Council. The second suit was then filed on the allegation that after the execution purchase of the properties by the appellants they had received rents and profits for which they had not accounted and to which the plaintiffs were entitled. The trial Court held that the matter was res-judicata, but in appeal the High Court came to the conclusion that the plaintiff was entitled to the profits and ordered accounts. Before the Privy Council the main question that arose was whether the second suit was barred by Order 2, rule 2, or not. While considering the question. Sir George Lowndes, who spoke for the Court, made the following observations:——

> "The rule in question is intended to deal with the vice of splitting a cause of action. It provides that a suit must include the whole of any claim which the plaintiff is entitled to make in respect of the cause of action on which

he sues, and that if he omits (except with the leave of the Court) to sue for any relief to which his cause of action would entitle him, he cannot claim it in a subsequent suit. The object of this salutary rule is doubtless to prevent multiplicity of suits.

The cause of action in the present suit is, their Lordship think, clearly the same as in the previous suit, the right to the rents and profits vested on the same foundation of facts and law as the right to have the purchases of the decree and of the properties declared to be purchased for the mortgagors.

The relief which the respondents claim in the present suit is an account of the rents and profits of these properties received by the appellants after their purchase and before the conveyance to the respondents. It is, their Lordships think equally clear that this relief could have been claimed in the previous suit. The conversion, by the execution purchase during the pendency of the suit, of the rights under the decree into the properties, entitled the respondents to ask in that suit for the conveyance of the properties. They evidently claimed this relief in the trial Court, but the subordinate Judge though that as there was no appropriate prayer in the plaint he could not grant it. The respondents went to the High Court on the contention that the Subordinate Judge was wrong, and that he ought to have ordered the conveyance of the properties. The High Court accepted this contention and granted the relief which the respondents so sought. If this was right, and their Lordships have no doubt that it was, it is obvious that the respondents could also have claimed an account of the rents and profits, and not having done so, or having abandoned the claim, they cannot seek this relief in a subsequent suit."

The ratio of the above decision clearly brings out that a claim for rents and profits of immovable property and a claim for possession of that property arise out of the same cause of action.

(49) The above decision is sought to be distinguished on the ground that in the second suit there was no claim for mesne profits

and that there was no earlier suit for possession of immovable property. In my opinion, the distinction sought to be drawn does not really arise. In *Naba Kumar Hazra's* case the judgment-debtors had claimed in the earlier suit that the purchase by the pleader's wife was fraudulent and a prayer for reconveyance of the properties was made. The possession of the immovable proptrties by the pleader's wife can in the circumstances be considered unlawful. The rents and profits of these properties received by the person in unlawful possession were in fact mesne profits. The fact that in the suit the claim was for accounts of the rents and profits received and not for mesne profits is of no material consequence, as the profits received would fall within the definition of the expression "mesne profits" as used in section 2(12) of the Civil Procedure Code. I have, therefore, no hesitation in holding that the observations in *Naba Kumar Hazra's* case fully support the contention that a claim for mesne profits and a claim for possession of immovable property in wrongful possession arise out of the same cause of action.

(50) While proceeding to examine the case-law I would first consider the cases which have taken the view that wrongful possession of profits and wrongful ouster constitute distinct and separate causes of action. So far as the Lahore High Court is concerned, the matter was considered in *Raja Bikrama Singh of Faridkot* v. *Prab Dial and three others* (14) it was ruled as under :—

> "The right to possess immovable property, and the right to enjoy the profits of such property are, we think, two distinct rights, and not necessarily connected. They are often found to be vested in the same person as owner of the property, but they may be, and often are, vested in different persons. An infringement of the former right does not necessarily involve an infringement of the latter right. An infringement of the right to possess immovable property may entitle the possessor to sue for two remedies; namely for damages for the trespass (not by way of mesne profits), and for recovery of possession; but does not of itself entitle him to claim mesne profits. An infringement of the right to enjoy property by taking its

> profits, entitles the person so permitted to sue for compensation for the loss sustained, that is, for the profits actually received by the defendant, or what might with due diligence have been received by him. The two wrongs appear to us to give rise to two distinct causes of action, the first arising when the act of trespass is committed; the second when the mesne profits should have been receivable by the plaintiff, but for the defendant's wrongful act."

The above observations were made in a case where it was not canvassed that the causes of action in a claim for possession of immovable property and for mesne profits were not distinct and the argument only proceeded on the basis of the change in language of section 43 of the Code of 1882 as compared with section 7 of Act VIII of 1859. Even otherwise, there is no basis for concluding that a right to possess immovable property and a right to enjoy the fruits thereof are not necessarily connected and that an infringemnt of either of the rights would not involve an infringement of the other right. A right to claim mesne profits would only arise if there is a right to possess immovable property which yields profits. In forming this view, I find support from *Chaudhri Kudan Mal and others* v. *Sardar Allah Dad Khan and others* (12) though the facts in this case were somewhat different. In this case a mortgagee, after the date of the expiry of the mortgage term, sued only for interest due and not for principal though both the principal and the interest were then payable. On these facts it was held that the plaintiff was precluded from suing for the principal amount subsequently in view of the provisions of section 43 of the Code of Civil Procedure, 1882. This decision was based on an earlier decision in *Ganga Ram* v. *Abdul Rahman* (11).

(51) *Tirupati and others* v. *Narasimha* (31) is the earliest Madras case taking the view that a claim for possession of the land was not barred under section 43 of the Code of Civil Procedure, merely because the plaintiff had omitted to claim the land in the fomer suit for mesne profits. No reasoning has been given in this judgment and the decision proceeded on the assumption that a suit for mesne profits and a suit to eject were not parts of a claim founded on the identical cause of action within the meaning of section 43

(31) (1888) I.L.R. 11 Mad. 210.

of the Civil Procedure Code. What is more surprising is that no reference was made to the earlier decision of the same Court in *Venkoba* v. *Subbanna*, (15) even though one of the judges in *Tirupati's* case was also member of the Bench in *Venkoba's* case and this case had been decided only a few days earlier. In *Venkoba's* case, the plaintiffs claimed possession of certain land and got a decree, in execution of which he obtained possession. Subsequently he brought a suit for mesne profits for three years prior to the taking of possession. It was held that section 43 was a bar to suits for such mesne profits. It was concluded that the words "every suit shall include the whole of claim in respect of the cause of action" include not only the claim arising out of that cause of action but also any other claim founded on the same cause of action and enforceable at the date of the former suit. Support for this view was obtained from *Madan Mohan Lal* v. *Lala Sheo Sanker Sahai* (32).

(52) The question was then considered by a Full Bench of the Madras High Court in *Ponnammal* v. *Ramanirda Aiyar and two others*, (16) wherein accepting the view in Tirupati's case in preference to *Venkoba's* case it was held that it was open to the plaintiff to bring a subsequent suit against the defendants for the profits which became payable before the institution of the former suit and which might have been included in that suit. This conclusion was reached on the basis of section 10 of the Civil Procedure Code of 1859 and section 44 of the Code of Civil Procedure, 1882 (now Order II, rule 4). The argument that section 10 of the Code of 1859 treated a claim for recovery of land and a claim for mesne profits arising out of such land as distinct causes of action is not plausible, as has been discussed in an earlier part of the judgment. As noticed earlier, in fact section 10 supports the view that a claim for recovery of land and a claim for mesne profits arise out of the cause of action and would have been treated as such but for the deeming provision in section 10. The second limb of the argument, which is based on section 44 (Order 2, rule 4, Civil Procedure Code, 1908) has also been examined earlier and the conclusion reached was that this provision does not, on a true construction of this provision, support the view adopted in *Tirupati's* case and followed in *Ponnammal's case*.

(32) I.L.R. 12 Cal. 482.

(53) The next case to which reference was made, is *Tadepalli Ramiah* v. *Madala Thathish and another* (18) but this is a case where the second suit related to a claim for mesne profits accruing subsequently to the suit for recovery of possession. Such a claim the plaintiff was not entitled to make at the time the suit for possession was filed. The proposition that even though a prior suit had been instituted for possession a second suit for mesne profits accrued since the institution of the suit would lie, has never been doubted and in *Tadepalli Ramiah's* case the decision of the Privy Council in *Naba Kumar Hazra's case* (9) was considered in the light of this principle and it was concluded that the Privy Council did not intend to depart from the well-settled principle that a second suit for mesne profits accrued after the institution of the suit would lie. This authority is, therefore, of limited relevance. The view taken by the Madras High Court in *Ponnammal's case* was reiterated in *Venugopal Pillai and others* v. *Thirugnanvalli,* (17). The argument was not examined afresh in this case and it appears that the cases in which the contrary view had been taken were not brought to the notice of the learned Judges deciding this case.

(54) In *Kishori Lal Roy* v. *Sharut Chunder Mozumdar* (20) a Full Bench of the Calcutta High Court, considered the question whether for the purpose of determining the stamp fee payable on an appeal to the High Court the claim for possession and mesne profits should be considered as distinct and separate claims within the meaning of section 17 of Act VII of 1870. While considering this aspect it was observed that having regard to the practice of the Courts and the language of the Legislature the policy of the law has always been to induce a plaintiff to dispose of his whole claim for possession of land and mesne profits in one suit only. It was further observed as follows :—

> "And there seems much good sense in this policy, because in the generality of such cases, the plaintiff's right to mesne profits follows his right to possession, in the same way that in a money claim, a right to interest follows the right to the principal sum. The Court which decides the question of possession has generally all the materials before it to decide at the same time the question of mesne profits; and it would be only entailing both upon the Court and the parties unnecessary expense and trouble, to try the claim in two different suits."

In was further noticed in this case that in passing the Civil Procedure Code of 1859, the Legislature seems to have contemplated the joineder, under ordinary circumstances, of claims for possession and for mesne profits in one suit. The following observations were made in respect of section 10 of the Code of 1859 :—

> "And then S. 10 enacts, that, for the purposes of sections 8 and 9, a claim for possession and for mesne profits shall be deemed to be distinct causes of action. This, I think, implies that a claim for possession and mesne profits, when joined in one suit, would, but for this last section, be considered as one cause of action; but that, for purposes of jurisdiction, and of allowing the Court to order separate trials, if necessary, such a claim was to be considered as embracing distinct causes of action."

The ratio of the decision in *Kishori Lal Roys case* (20), therefore, clearly supports the view that a claim for recovery of possession and a claim for mesne profits form one cause of action.

(55) In *Monohur Lall and others* v. *Gouri Sunkur* (33), to which our attention was drawn, it was held that a plaintiff suing for mesne profits of land is not precluded from afterwards maintaining a suit for possession of such land. These observations were made on the basis of section 10 of the Act of 1859 which clearly provided that a claim for recovery of land and a claim for mesne profits were to be deemed to be distinct causes of action. This authority has, therefore, no bearing on the question before us.

(56) In *Lalessor Babui and others* v. *Janki Bibi* (21), the question was directly considered, as the second suit for mesne profits for the period antecedent to the date of the institution of the first suit for the recovery of possession was dismissed on the ground that it was barred by the operation of second 43 of the Code of 1882. In coming to the conclusion that the second suit for mesne profits was not barred, reliance was placed on the earlier decision of the Calcutta High Court in *Kishori Lal Roy's case* (20), and *Mon Mohan Sirkar* v. *The Secretary of State for India in Council* (34). It was further noticed that the case of *Lalji Mal* v. *Hulasi* (4), was not in point, and the decision in *Venkoba* v. *Subbanna* (15), was not accepted as laying

(33) I.L.R. 9 Cal. 283.
(34) I.L.R. 17 Cal. 968.

down the correct law. To me it appears that the ratio of the decision in *Kishori Lal Roy's* case was not correctly appreciated, as the basis on which the decision was arrived at and the observations to which a reference has already been made clearly favour the view that a right to mesne profits is to be treated as an accessary to the right to possession. The observations in *Kishori Lal Roy's* case further show that the evidence necessary to decide the question of mesne profits and the question of possession is generally the same and that if the two claims are tried separately it would lead to unnecesasry expense and trouble. The only plausible way these observations can be interpreted is that the Full Bench in *Kishori Lal Roy's* case considered the claim for possession of immovable property and the claim for mesne profits arising therefrom as one cause of action.

(57) So far as *Mon Mohan Sirkar's* case is concerned, it related to a suit for mesne profits which had accrued between the date of the institution of the suit for recovery of possession and the date of delivery of possession. As the second suit was in respect of the mesne which had accrued after the institution of the suit for recovery of possession, the decision of this case has no bearing on the point that is now under consideration in the present case. It may also be added that the view that *Lalji Mal's* case was not applicable is not tenable. In this case the mortgagee was to obtain possession of the mortgaged property and was to take the mesne profits but was kept out of possession for three years. He then filed a suit to enforce the performance of the contract for delivery of possession and obtained a decree. His subsequent suit for mesne profits for the period he was not given possession was dismissed on the ground that it was barred by the provisions of section 43 of Act X of 1877. The following observations made by Straight, J., who spoke for the majority view in this Full Bench clearly supports the contention that a claim for possession of immovable property and a claim for mesne profits arising therefrom arise out of the same cause of action:—

> "As the mortgagee might in the former suit, in addition to seeking the specific performance of the mortgage-contract, have asked for such mesne profits by way of compensation for the breach of it, and as the claim for possession and mesne profits were in respect of the same cause of action, viz., the breach of the contract to give possession, the second suit was barred by the provisions of section 43 of Act X of 1877."

(58) In *Sris Chandra Nandy* v. *Joyramdanga Coal Concern Ltd.* (22), while considering whether the suit fell within the purview of section 17 of the Court fees Act, it was observed that claims for possession and mesne profits were not based on the same cause of action. This view was based on *Lalessor Babui's* case and no fresh approach to the point in issue was made.

(59) In support of the view that a claim for possession of immovable property and a claim for mesne profits arising therefrom are two distinct causes of action, reference was made to *Loknath Singh* v. *Dwarika Singh* (25). In this case the plaintiff brought a suit for mesne profits for three years, but the suit was resisted on the ground that the claim for mesne profits was not maintainable in the absence of a claim for recovery of possession. The defence was rightly held to be untenable for the reason that the objection could only be raised to the subsequent suit for ejectment when brought and not to the suit for mesne profits which was brought earlier. No doubt in this case it was held that cause of action for ejectment is distinct from the cause of action for mesne profits, but these observations were in the nature of *obiter*, as the point did not really arise in this case.

(60) In *Abburi Rangamma* v. *Chitrapu Venupurnachandra Rao and others* (24), the question arose whether the plaintiff who had earlier instituted a suit for mesne profits of immovable property could subsequently sue for recovery of posssession or whether Order 2, rule 2, Civil Procedure Code, stood in the way. The conclusion reached was that the cause of action for recovery of immovable property and a cause of action for mesne profits of the property claimed were distinct and separate. For coming to this conclusion four reasons in the main have been adopted, which may be formulated as follows—

(1) That Order 2, rule 4, treated the two cause of action separately.

(2) That the dates of the accrual of cause of action in both these cases and the period of limitation prescribed were different.

(3) That the facts which would constitute the cause of action in case of mesne profits may not be identical in a suit for recovery of immovable property and that the evidence to prove the necessary facts in the two cases would be different.

(4) That section 10 of the Code of 1859 contemplated that a claim for recovery of possession of immovable property

and a claim for mesne profits were to be treated as distinct causes of action and that the policy underlying this provision was retained in Order 2, rule 4.

All the above arguments have been examined earlier and, with utmost respect for the learned Judges who decided *Abburi Rangamma's* case, I am unable to accept these arguments as plausible and the reasons for this view have already been indicated earlier. It may be mentioned further that the ratio of the decision in *Naba Kumar Hazra's* case was not considered in this case nor was reference made to the body of case-law in which the contrary view has been taken.

(61) The only other case supporting the above view, to which reference may be made, is *Myaing and another* v. *Mg. B. Chit and others* (23), as in this reference has been made to the cases in which the contrary view was adopted. Without, however, examining the reasoning it was concluded that a suit for mesne profits was not barred by a previous suit for partition and separate possession. The decision of the Privy Council in *Naba Kumar Hezra* was not examined in this case.

(62) In support of the contrary view, reference has been made to the decisions of the Allahabad High Court in I.L.R. 3 All. 543 and 660, I.L.R. 17 All. 533, A.I.R. 1933 Allahabad 84, AIR 1940 Allahabad 524, and the decisions of the Bombay High Court in AIR 1942 Bom. 338 and AIR 1964 Bom. 42. Reference was also made to ILR 12 Cal. 482, ILR 27 Mad., 116, AIR 1954 Orissa 202, AIR (29) 1942 Peshawar 9, AIR 1915 Sind 35; and AIR 1953 Madhya Bharat 161.

(63) *In Debi Dial Singh and others* v. *Ajaib Singh and others* (35), the cause of action for the recovery of mesne profits was the same as the cause of action for recovery of possession of immovable property. No reasons for this view have been indicated and, therefore, in order to appreciate the reasoning, we will have to examine the case of *Lalji Mal and another* v. *Hulasi and another* (4). On an examination of the various provisions of the Civil Procedure Code, it was held that the claims to possession and to mesne profits were in respect of one and the same cause of action, namely, the breach of the contract to give possession.

(35) I.L.R. 3 All. 543.

(64) In *Mewa Kaur* v. *Banarsi Prasad* (5), a Division Bench of the Allahabad High Court, following the decision in *Lalji Mal's* case and *Venkoba's* case, it was held that the claim for mesne profits for the period prior to the institution of the suit for possession was barred by section 43 of the Civil Procedure Code. In this case the argument that Order 2, rule 4, provided an indication that the two causes of action were separate was examined and it was observed that in section 44 of the Code of Civil Procedure, 1882, which was substituted by Order 2, rule 4; Civil Procedure Code, 1908, cause of action and claim were treated as synonymous. It was considered doubtful whether section 44, which provided a rule of procedure, intended to enact that a claim for mesne profits and a claim to recover the land in respect of which the mesne profits were claimed could not arise out of the same cause of action. The argument was further examined in the following words:—

> "It is possible that there may be a case in which a party would be entitled to claim recovery of immovable property and to claim mesne profits in respect of that property in which the cause of action might not be the same, and it may have been to provide for such a case as that clause (a) or Section 44 was inserted in that section. Such a case does not present itself to our minds. We cannot say that such a case has not arisen. What the first paragraph of s. 43 enacts, so far as it is necessary to refer to it, is that—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." In the former suit the cause of action in respect of which the claim for possession was made was, so far as the present defendant was concerned, the forfeiture entitling the plaintiff to possession and the wrongful keeping of the plaintiff out of the possession and enjoyment of the property. Now what was the cause of action for the mesne profits claimed from the defendant-appellant? It was stated briefly that, the plaintiff being entitled by reason of the forfeiture to possession, this defendant wrongfully withheld possession from the plaintiff and deprived him of the profits of the land. It appears to us that there were here not two causes of action, but one and the same cause of action, and that the same cause of action which supported the plaintiff's claim for possession in the previous suit supports his claim for mesne profits

in the present suit, so far as the period between the 31st of January, 1889 and the 23rd of December, 1889 is concerned."

(65) In *Ganeshi Lal* v. *Bansi Dhar and others* (36), it was ruled that Order 2, rule 2, enunciated a rule of public policy which disfavours multiplicity of suits. A suit for recovery of possession was held to be barred where a prior suit for rent of the same property had been instituted and in that suit possession had not been asked for. The same view is reiterated in *Saghir Hassan* v. *Tayab Hasan* (27), and it was notice that a right to claim possession and a right to claim mesne profits arise out of the wrongful dispossession of property and the cause of action is the same in respect of both the claims.

(66) Before parting with the decision of the Allahabad High Court, mention may be made of the decision in *B. Ram Karan Singh and others* v. *Nakchhad Ahir others* (6), in which a Special Bench, which decided this case; held that a claim for mesne profits accruing subsequently to the institution of the previous suit is a claim based on a different cause of action and is not barred by the provisions of Order 2; rule 2. In this case no doubt it was observed that a cause of action for recovery of immovable property was not necessarily identical with a cause of action for recovery of mesne profits but these observations were made in a case where the second suit related to mesne profits for the period subsequent to the institution of the previous suit for possession. In fact; the case-law was examined with a view only to consider whether a suit for subsequent mesne profits was barred or not and not whether a suit for mesne profits accruing earlier to the institution of the previous suit was barred. So far as the claim for mesne profits for the period prior to the first suit is concerned: it was in a way accepted that such a claim would be barred. While examining the case of *Mewa Kuar* v. *Banarsi Prasad* (5); it was noticed that in this case a claim for mesne profits prior to the institution of the earlier suit was held to be barred and the correctness of this decision was not doubted. On the other hand; in suport of the ratio of this decision; reference was made to *Madan Mohan Lal* v. *Sheo Shankar Sahai* (32); in these words 'that a subsequent claim for mesne profits prior to the suit would be barred is also apparent from the case decided by their Lordships of the Privy Council; *Mdan Mohan Lal* v. *Sheo Shankar*

(36) A.I.R. 1933 All. 84.

Sahai (32). "A distinction was consequently drawn between these cases and the cases which related to claim for mesne profits accruing after the date of the institution of the suit. *B. Karan Singh's* (6), therefore, cannot be pressed into service for the view that a second suit for mesne profits is not barred where in the first suit possession was claimed in respect of the property from which the mesne profits accrue and in fact, on a true interpretation of its ratio, it indirectly lands support to the contrary view.

(67) So far as the Bombay High Court is concerned, the first case to which reference is made is *Ramchandra* v. *Lodha* (8). In this brief judgment, following the decision in *Ponnammal's* case, it was held that omission to sue for mesne profits prior to the date of the plaintiff's suit for possession of immovable property does not bar the second suit against the same defendants for those mesne profits. The basis of this conclusion was not independently examined. Moreover, in a subsequent case, *Channappa Girimalappa Jolad* v. *Bagalkot Bank* (7), this authority was explained and not relied upon and it was held as follows :—

> "The right to the rents and profits of the properties wrongfully alienated by the adoptive mother rests on exactly the same facts and law as the claim to the corpus of those properties and hence where a claim for mesne profits is not included in a previous suit for possession of the property, a second suit for such mesne profits is barred by O. 2, R. 2."

In this case the argument that Order 2, rule 4, indicated that a claim for mesne profits or arrears of rent and a suit for recovery of immovable property were different causes of action was examined in detail and it was noticed as under :—

> "Now it was held by this Court in 26 Bom. L.R. 288 (A.I.R. 1924 Bom. 368: 80 I.C. 259: 26 Bom L.R. 288, Ramachandra v. Lodha) that a claim for possession to immovable property is not founded the same cause of action as a claim for mesne profits in respect of that property. The plaintiff in that case having sued for possession of immovable property, and omitted to claim mesne profits, was held entitled nevertheless to file a subsequent suit claiming mesne profits. The Court relied to a great extent on O. 2, R. 4,

Civil P.C., which provides (*inter alia*) that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except claim for mesne profits or arrears of rent in respect of the property claimed or any part thereof. It is said that rule recognises the fact that a claim for possession and a claim for mesne profits derived from the property of which possession is claimed are founded on two different causes of action. Order 2, R. 4 is founded on O. 14, R. 6 of the Rules of the Supreme Court in England, and those rules do not contain any rule corresponding with O. 2, R. 2. It seems to that it may well be that the expression "cause of action" in O. 2 'R. 2, has a wider meaning than the expression in O. 2, Rule 4. Moreover, the provision in the latter rule may have been inserted *ex abundanti cautela* without intending to lay down that the causes of action for possession and for mesne profits or arrears of rent accruing were distinct.

While coming to this conclusion, support was obtained from the judgment of the Privy Council in *Naba Kumar Hazra's* case.

(68) In *Dwarkadas Nathmal* v. *Vimal alias Yamuna and others* (10) a plaintiff brought a suit for recovery of mesne profits for the year 1951 and obtained a decree. He then brought a second suit for recovery of the mesne profits for the two subsequent years against the same defendants and on these facts it was held that the second suit was barred by Order 2, rule 2, as two claims arose out of the same cause of action. The facts that in the two suits the plaintiff had to establish that the defendant was in possession of the property during two different periods was held not to justify the conclusion that the cause of action for the two suits would be different.

(69) Following the ratio of the decision in *Naba Kumar Hazra's* case, it was held in *Mukunda Pradhan and another* v. *Krupasindhu Panda and another* (37), that the claim for mesne profits which accrues from the date of right to possess till the date of institution of the suit for possession arises from the same cause of action. In *Mohd.*

(37) A.I.R. 1954 Orissa 202.

Yunas Fazal Mohamad v. *Mt. Jahan Sultan, d/o Ahmed Din and another* (38), the same view was taken and it was held that where a plaintiff sues for mesne profits where a claim for possession is also open to him, the subsequent suit for possession is barred. Suit for mesne profits and suit for possession of immovable property were treated as if they arose out of the same cause of action. In *Hiromal and others* v. *Faridkhan* (39), the plaintiffs first filed two suits for mesne profits which were decided in their favour and it was held that they had proved their title to the land. Subsequently the plaintiffs filed a suit for recovery of possession and the question arose whether this suit was barred under Order 2, rule 2 of the Civil Procedure Code. The question whether a claim for possession of immovable property and the claim of mesne profits arising therefrom arose from one cause of action or different causes of action, was considered in the light of Order 2, rule 2, and Order 18, rule 2, Rules of the Supreme Court, and also section 10 of the Civil Procedure Code of 1859, in the following words:—

> "For the appellant it is urged that Order 2, rule 4, makes it clear that a claim for mesne profits is a separate cause of action to a claim for recovery of possession of land. This rule follows closely the wording of the English rule — Order 18, rule 2, Rules of the Supreme Court. There the use of the word claim as synonymous with cause of action is probably due to the fact that in the phraseology of the English Law a plaint is called a statement of claim. The word claim, therefore, denotes not only the demand for the relief, but the basis on which that demand is made. Rule 4, if literally interpreted, might lead to the inference that a claim for mesne profits involved a separate cause of action to a claim for the land, but section 44(a), Civil Procedure Code of 1882, to which the rule corresponds, was interpreted by the Privy Council in the case of *Gunesh Dutt Thakoor* v. *Jewach Thakorain* (40). In that case the cause of action was the refusal of the defendants to recognize the right of the plaintiff, a widow, to succeed to her deceased husband's share in the

(38) A.I.R. (29) 1942 Peshawar 9.
(39) A.I.R. 1915 Sind 35.
(40) (1904) 31 Cal. 262.

family property under a partition which had not been completed at her husband's death. It was contended that Section 44(a) barred the claim to recover the moveable with the immovable property, the subject of the partition in the same suit. Their Lordships said :

'The rule, i.e., Section 44(a), is not very happily expressed, but there can be nothing irregular in seeking to recover in one suit immovable and moveable property if the cause of action is the same in both.'

"I understand their Lordships' adverse criticism of section 44(a) to mean that the provision as to mesne profits should not have been stated as an exception, but taken as a proviso or as an explanation. Being stated as an exception, it implied that no other claim for moveable property could be joined in a suit for recovery of land. But the intention that should have been expressed was that claims for mesne profits and rent being on the same cause of action were not within the rule. It is this judgment of the Privy Council which has undoubtedly led to the new clause (e) of the rule. This clause relates to claims on the same cause of action and is clearly no exception. So that the defect to which the Privy Council referred has been repeated instead of being corrected. In my opinion, clause (a) and clause (e) of the rule are of the same character. They are not exceptions but provisos added with a view to explain that the rule does not forbid the joinder of claims to moveable property when they arise out of the same cause of action. Section 10, Civil Procedure Code of 1859, enacted that a claim for the recovery of land and a claim for mesne profits of such land 'shall be deemed to be distinct causes of action' within the meaning of the section referring to joinder of causes of action. The use of the words 'shall be deemed to be' shows that the Legislature was conscious that the rule was an artificial one. This section has been omitted in the subsequent codes and it would be very surprising if the present rule was intended to preserve this artificial distinction, for the object of the amendments made in Order 2, rule 2, was to check multiplicity of litigation and to remove restrictions on the comprehensiveness of the suit.

It is difficult to see any distinction between dispossession of land and its profits and the dispossession of immovable and moveable property, which was the subject of the judgment of the Privy Council in the cases already referred to."

The above observations bring out that Order 2, rule 4, was not intended to provide an exception to Order 2, rule 2, but was to be taken as an explanation only. Notice was also taken of the fact that section 10 of the Civil Procedure Code of 1859 was omitted in the subsequent Codes and from this an inference was drawn that the artificial distinction created by section 10 was not intended to be preserved. This, in my opinion, places the correct interpretation on order 2, rule 4. The same view was taken in *Gangabhai* v. *Kanhaiyalal and another* (41) and the reasoning adopted in Hiromal's case (supra) was accepted as the correct interpretation.

(70) Having regard to the entire discussion made above, I find no escape from the conclusion that a second suit for recovery of mesne profits would be barred if in the earlier suit for recovery of possession of immovable property that relief is not claimed and that a cause of action for the recovery of immovable property and for the recovery of mesne profits arising therefrom is the same. The Privy Council in *Naba Kumar Hazra's case* (supra) has adopted this view, and the earlier authorities in which the contrary view was taken do not lay down the correct law.

(71) Consequently, the finding on issue No. 2 is set aside and this issue is found against the plaintiffs. The appeal of the defendant-appellants must, therefore, succeed and is accepted. There will be, however, no order as to costs.

ORDER OF THE COURT

(72) In view of the majority opinion, this appeal is dismissed with no order as to costs.

K.S.K.

(41) A.I.R. 1953 Madhya Bharat 161.

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