APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

May 31.

KUPPARAKUTTI ADAMMEERA (APPELLANT)

v.

ESOOF (*a*) S. M. MOHAMED ESOOF AND ONE (RESPONDENTS).*

Suits for mesne profits—Subsequent suit for possession—Whether barred by Order 2, Rule 2, Code of Civil Procedure—Cause of action for possession and for mesne profits considered—Urban Rent Control Act, order under—Whether Controller can review or cancel.

Plaintiff-appellant sued for mesne profits and obtained decrees against the 1st defendant-respondent. After the passing of the decree the 1st defendant-respondent applied to the Controller of Rents and made the house owner a party only but did not make the plaintiff a party and obtained an order from the Controller of Rents for occupation under s. 12 of the Urban Rent Control Act. When the plaintiff-appellant became aware of the order he applied to the Controller of Rents and asked for vacating of the order and the order was vacated. Plaintiff-appellant then filed a suit for possession. The defendants-respondents contended that—

(1) the suit was barred under Order 2, Rule 2, of the Code of Civil Procedure as the rights to mesne profits rested on the same cause of action as for possession and

(2) that the first order of the Controller of Rents was final and he had no jurisdiction to review his earlier order.

Held: That suit for possession and suit for mesne profits do not arise out of the same cause of action. Causes of action of two suits are different and therefore the suit was not barred under Order 2, Rule 2, of the Code of Civil Procedure. In a suit for possession the plaintiff-appellant need only to prove possession within 12 years and defendants' occupation without right. For mesne profits he has in addition to prove the duration of the dispossession, its termination and the amount he is entitled to as damages. So far as Burma is concerned this question has been settled in *D. K. Dubash Kader and two others* v. *T. K. Fakeer Meera*, (1910) 3 B.L.T. 56 at p. 59, and the same cannot be deemed to have been overruled by the Privy Council case, A.I.R. (1931) P.C. 221. The case law on the point reviewed and considered. Moreover the case of *D. K. Dubash Kader and two others* v. *T. K. Fakeer Meera* was decided in 1910 and has been followed for about 40 years—therefore in any case the principle *stare decisis* should apply.

* Civil 1st Appeal No. 80 of 1947 against the decree of Civil Regular No. 214 of 1947 of the High Court of Judicature at Rangoon, dated the 25th November 1947.

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Held further : That the first order of the Controller of Rents was final and could not be questioned except under proviso to s. 12 (2) and s. 13 (1) of the Act. He had no power to cancel his order in the present case and his subsequent order was a nullity.

P. K. Basu for the appellant.

Dr. Ba Han for respondent No. 1.

U THEIN MAUNG, C.J.—The plaintiff-appellant sued the defendants-respondents for possession of room No. 1 in 225, Fraser Street, Rangoon. His case is that he rented the said room from one G. M. D. Dinath, agent of the 2nd defendant-respondent, who is the owner thereof at a rent of Rs. 3-4 per day in May 1942, that during his temporary absence between the 7th May 1945 and the 4th June 1945, the 1st defendant-respondent trespassed into and took possession of the premises, that 1st defendant-respondent in collusion with the 2nd defendant-respondent obtained a permit under section 12 of the Urban Rent Control Act, 1946, from the Controller of Rents, Rangoon, on the 10th May 1947, and that on his application for review the said Controller passed an order cancelling the permit on the 4th June 1947.

Both the defendants-respondents deny that there was any collusion between them and state that the 1st defendant-respondent has entered into a written

tenancy agreement with the 2nd defendant-respondent on the 23rd May 1947, *i.e.* after the date of the said permit and that the Controller has no jurisdiction to review his own order granting the permit. The 1st defendant-respondent further contends that the suit is barred under Order II, Rule 2, of the Code of Civil Procedure inasmuch as the plaintiff-appellant's rights to the mesne profits in three previous suits, *viz.* Civil Regular No. 819 of 1946, Civil Regular No. 262 of 1947 and Civil Regular No. 1865 of 1947 of the City Civil Court of Rangoon rested on the same foundation of facts and law as the right that he claims in the present suit.

The learned Judge on the Original Side has dismissed the suit both on the ground that it is barred under Order II, Rule 2, of the Code of Civil Procedure and on the ground that the Controller had no jurisdiction to pass the order of the 4th June 1947 cancelling the said permit. Hence this appeal.

The appeal must fail if we agree with the learned Judge on the Original Side that the suit is barred under Order II, Rule 2, of the Code of Civil Procedure or that the Controller had no power to cancel the permit; and it is really unnecessary to give our decision on both questions for the purposes of this appeal. However, the learned advocates have discussed both questions so thoroughly that we feel that we should give our decision on both.

With reference to the objection under Order II, Rule 2, of the Code of Civil Procedure, the main questions for consideration are (1) whether the cause of action for recovery of possession of immovable property is distinct and separate from the cause of action for mesne profits and (2) whether the claims for recovery of possession of immovable property and mesne profits therefor are just two claims for relief

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arising out of one and the same cause of action; and these questions are not *res integra*.

"Cause of action" having not been defined in the Code of Civil Procedure, it will be fair to gather its meaning from the next rule but one in the same Order, *i.e.* Order II, Rule 4, which reads:

"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."

So Bell J. of the late Chief Court of Lower Burma observed in *D. K. Dubash Kader and two others* v. *T. K. Fakeer Meera* (1):

"There has been inserted a new clause (*c*) which to my mind shows clearly that the Courts are not in future to treat the relief sought in any of the claims mentioned in the preceding clauses of the new Rule 4 as based upon the same cause of action as that on which a suit for the recovery of the immovable property is based. If this were not the intention of the Legislature, either clauses (*a*) and (*b*) would have been omitted as superfluous, or their contents would have been brought into the present clause (*c*) as specific instances of the claims therein generally referred to, or else clause (*c*) must have begun with some such words as 'all other claims.'

* * * *

It seems to me, therefore, that, in cases governed by the new Code of Civil Procedure, the relief sought in a claim for arrears of rent or mesne profits of immovable property must be regarded as based upon distinct and separate causes of action, and hence the restrictive provisions of Order II, Rule 2, do not affect the claimant's right to bring two separate suits for the recovery of the property and for arrears of rent or mesne profits which became

(1) (1910) 3 B.L.T. 56 at p. 59.

due before the suit for the recovery of the immovable property was instituted."

Bell J.'s decision in the said case has been approved by a Bench of the late High Court of Judicature at Rangoon in *Ma Myaing and one* v. *Maung Po Chit and three others* (1).

The decision in *Ma Myaing*'s case (1) is in accordance with the ruling of the Calcutta High Court in *Lalessor Babui* v. *Janki Bibi* (2) and the Full Bench Ruling of the Madras High Court in *Ponnammal* v. *Ramamirda Iver* (3) which was approved by the Bombay High Court in *R. A. Agarwale* v. *L. G. Bhadbhunji* (4).

The Full Bench observed with reference to Order II, Rule 4 :

> " . . . . when the rule says 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 (*a*) claims for mesne profits or arrears of rent in respect of the property claimed, or any part thereof, it is quite clear that the Legislature considered that claims for the recovery of land and claims for mesne profits were separate causes of action, ..."

Beaumont C.J. observed in *R. K. Pujari* v. *S. S. Pujari* (5) :

> "The language of Order II, Rule 4, which provides 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 '(*a*) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof' certainly suggests that the Legislature regarded a claim for possession of immovable property and a claim for mesne profits in respect of that property as being separate causes of action."

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(1) (1926) I.L.R. 4 Ran. 103.
(2) (1892) I.L.R. 19 Cal. 615.
(3) (1915) I.L.R. 38 Mad. 829.
(4) 26 Bom. L.R. 288.
(5) (1935) I.L.R. 59 Bom. 454 at p. 456.

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N. J. Wadia J. also observed therein :

"The cause of action for the claim for future mesne profits cannot be said to be the same as the cause of action for partition and possession. . . . . If Mr. Jahagirdar's contention that the cause of action for future mesne profits was the same were accepted, the provisions of Rule 4 of Order II would become meaningless. That rule expressly provides that a claim for mesne profits can be joined in a suit for the recovery of possession of immovable property. If a claim for mesne profits could only be made along with a claim for possession, there would have been no need whatever for the provisions of Rule 4."

In *C. L. Singh* v. *C. D. Singh* (1) Jwala Prasad J. observed :

"The right to eject the defendant arises the moment the possession of the defendant becomes unlawful. The right to mesne profits arises at different times when the profits accrue to the defendant. The date of the cause of action for ejectment is one fixed date, whereas the dates of the cause of action for mesne profits are several. Order II, Rule 4, to my mind distinctly recognizes that the cause of action for ejectment is distinct from the cause of action for mesne profits, for unless they were two distinct and separate entities there was no necessity for providing in the aforesaid rule for their uniting together in one single claim against the defendant."

A Full Bench of the Allahabad High Court also observed in *R. K. Singh and others* v. *N. C. Ahir* (2) :

"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 II, Rule 4, indicate that the Legislature thought it necessary to provide specially 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.

(1) (1931) I.L.R. 10 Pat. 329 at p. 331.

(2) (1931) I.L.R. 53 All. 951 at. pp. 956-7.

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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. Mesne profits accrue from day to day and the cause of action is a continuing one, and arises out of the continued misappropriation of the profits to which the plaintiff is entitled. * * * * It is also clear that the bundle of facts which would constitute the cause of action in favour of the plaintiff would not necessarily be identical in a suit for recovery of possession and in a suit for mesne profits. In a suit for possession the plaintiff need only prove his possession within twelve years and the defendant's occupation of the property without right. In a suit for mesne profits he has, in addition, to prove the duration of the whole period during which the dispossession continued, including the date on which it terminated, as well as the amount to which he is entitled by way of damages. Evidence to prove these latter facts would undoubtedly be different from that which would be required to prove the first set of facts."

However a Bench of the same High Court held in *Saghir Hasan* v. *Tayab Hasan* (1) :

"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 II, 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 any further mesne profits. A subsequent suit for mesne profits is therefore barred."

It distinguished the said Full Bench case on the ground that it merely decided that where the plaintiff sued for possession of lands, but did not claim mesne profits accruing after the institution of the suit, and when mesne profits were not refused by the Court, it was open to him to bring a subsequent suit for future mesne profits.

(1) (1940) All. 781.

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Beaumont C.J. also has stated in *Channappa Girimallappa* v. *Bagalkot Bank* (1) :

" It seems to me that it may well be that the expression ' cause of action ' in Order II, Rule 2, has a wider meaning than the expression in Order II, 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."

The judgment of the Privy Council in *Naba Kumar* v. *Radhashyam* (2) seems to me to support that view. His Lordship appears to have resiled from the view that he had expressed in *Pujari's* case, but it is remarkable that he has done so without referring to that case at all. Besides, with due respect to His Lordship the language used by him in the above extract indicates that he is not sure of his ground. He says " It seems to me that it may well be that the expression ' cause of action ' in Order II, Rule 2, has a wider meaning than the expression in Order II, Rule 4. However Order II, Rule 2, which is in the nature of a penal clause must be construed strictly and it is inconceivable that the same expression would have been used with a wider and a narrower meaning in Rules 2 and 4 of the same Order. As has been pointed out in Broom's Legal Maxims, 10th Edition, page 395, " if any section be intricate, obscure, or doubtful the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another. This, as Sir E. Coke observed, is the most natural and genuine method of expounding a statute ; and it is, therefore, a true principle, that . . . . reference should be made to a subsequent section in order to explain a previous clause of which the meaning is doubtful." His Lordship also has stated " The

(1) (1943) Bom. 43 at p. 53. (2) (1931) A.I R. (P.C.) 229.

judgment of the Privy Council in *Naba Kumar* v. *Radhashyam* (1) seems to me to support that view. However, that was a case in which a pleader, who had acted for the mortgagors in a suit to enforce a mortgage, and his wife were sued by his former clients for retransfer of part of the mortgaged property which he had purchased and the suit was decreed in accordance with the principle underlying section 88 of the Indian Trusts Act, 1882. [See *Nagendrabala Dasi and another* v. *Dinanath Mahish and another* (2).] There was an appeal from the decree in that suit to the High Court and "by their memorandum of appeal (the plaintiffs) specifically asked also for the conveyance of the properties with necessary accounts." However, the High Court made no order for accounts, the claim for which seems to have been abandoned or, at all events, not to have been pressed. [*See* (1931) A.I.R. (P.C.) 229 at p. 230.] The subsequent suit was based upon the allegation that after the purchase the defendants were for some time in receipt of the rents and profits for which they had not accounted and the prayer of the plaint was for account and payment. So Their Lordships of the Privy Council held :

> "The cause of action in the present suit is, their Lordships 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 purchases for the mortgagors."

They also held that the defendants became trustees not only for the plaintiffs but also for their co-mortgagors in virtue of the decision in the previous suit. (See *ibid.*)

So that case is distinguishable as one in which the "beneficiaries" who had sued their "trustees" for

(1) (1931) A.I.R. (P.C.) 229. (2) (1924) I.L.R. 51 Cal. 279.

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declaration that the latter held certain properties for their benefit and also for recovery of possession of the said properties—abandoning or at all events without pressing their claim for accounts—were held to be debarred from filing a subsequent suit for accounts.

With reference to the contention that the Privy Council decision in *Naba Kumar*'s case must be held to have overruled all the decisions of the Madras High Court as well as the other High Courts, Venkataramana Rao J. observed in *T. Ramiah* v. *M. Thathiah and another* (1) :

". . . . The basis for their Lordships' opinion was that by reason of the purchase of the decree and the property the purchaser became a trustee for the judgment-debtors and the claim for rents and profits formed part of the claim arising out of the cause of action in the former suit. The action was not construed as one for mesne profits. There was no question of wrongful possession by the purchaser, because he must be deemed to have been in possession on behalf of the judgment-debtors and his possession was their possession. The claim was in substance to recover the property which was held by the purchaser on their account and the claim for profits was only a part of the claim for restoration of their property. It is one and the same claim and the cause of action was considered to be one and the same."

In *V. Pillai and others* v. *T. Ammal* (2) a Bench of the same High Court endorsed Venkataramana Rao J.'s reasons for repelling the contention and distinguishing the Privy Council decision. (*See* p. 430 thereof.)

For the above reasons we are of the opinion that the ruling of the High Court of Judicature at Rangoon in *Ma Myaing and one* v. *Maung Po Chit and three others* (3) and similar rulings of other High Courts cannot be deemed to have been overruled by the Privy Council. Although these rulings are based mainly on the interpretation of " cause of action " in Order II, Rule 2, with

(1) A.I.R. (1937) Mad. 849. (2) (1940) 2 M.L.J. 42.
(3) (1926) I.L.R. 4 Ran. 103.

reference to the provisions of Order II, Rule 4, they are consistent with the definition of mesne profits in section 2 (12) of the Code of Civil Procedure itself as those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received therefrom. Mesne profits as defined in section 2 (12) accrue from day to day; and the cause of action which arises out of the continued misappropriation of the profits is a continuing one, whereas the cause of action for recovery of possession of the property arises as soon as the plaintiff is dispossessed. The causes of action do not arise at the same time and the periods of limitation for suits on the causes of action are not the same. (*See* Articles 142 and 144 of the Limitation Act as regards suits for recovery of possession of immovable property and Article 109 thereof as regards suits for mesne profits.) These rulings are also consistent with the definition of "Cause of Action" as a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in his suit or as the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. As has been pointed out in *R. K. Singh and others* v. *N. C. Ahir* (1) in a suit for possession the plaintiff need only prove his possession within twelve years and the defendant's occupation of the property without right. In a suit for mesne profits he is in addition to prove the duration of the period during which the dispossession continued as well as the amount to which he is entitled by way of damages. Evidence to prove these latter facts would undoubtedly be different from that which would be required to prove the first set of facts. [Cf. *D. Ramiah* v. *M. Thathiah and another* (2) at page 851.] Besides a cause of action must be antecedent to the institution of

(1) (1931) I.L.R. 53 All. 95 at pp. 956-7. (2) A.I.R (1937) Mad. 849.

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the suit and as Beaumont C.J. has pointed out in *R. K. Pujari* v. *S. S. Pujari and another* (1) at page 456, the plaintiff cannot strictly be said to have a cause of action for something which does not exist at the date of the institution of the suit and future profits must necessarily be in that position. So the claim for mesne profits does not rest on the same foundation of facts and law as that for possession although these two different causes of action may arise from the same transaction [Cf. *Payana Reena Saminathan and another* v. *Pana Lana Palaniappa* (2)]. The provisions of the Code of Civil Procedure and the Limitation Act, which have been referred to above and according to which causes of action for possession and for mesne profits are different, may have had their origin in the ancient and technical view that the action for mesne profits was an action for trespass and not on the case, as pointed out by the learned Judge on the Original Side. However, whatever their origin may be, we must administer them as we find them.

The question as to whether the cause of action for possession and the cause of action for mesne profits are one and the same or whether they are separate and distinct is a question on which there has been considerable difference of opinion ; and the above review of the case law reveals that there still is considerable difference of opinion among the Indian High Courts. However, so far as Burma is concerned, the question has been settled by the judgment in *D. K. Dubash Kader and two others* v. *T. K. Fakeer Meera* (3) as long ago as 1910 ; and we are of the opinion that this is a matter in which the principle of *stare decisis* should be applied. "It is, then, an established rule to abide by former precedents, *stare decisis*, where the same points

(1) (1935) I.L.R. 59 Bom. 454 at p. 456. (2) 41 I.A. 142 at p. 148.
(3) (1910) 3 B.L.T. 56 at p. 59.

come again in litigation, as well to keep the scale of justice steady, and not liable to waver with every new Judge's opinion, as also because, the law in that case being solemnly declared, what before was uncertain and perhaps indifferent, is now become a permanent rule." (*See* Broom's Legal Maxims, 10th Edition, page 90.)

". . . . Whenever a decision is departed from, the certainty of the law is sacrificed to its rational development, and the evils of uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The precedent, while it stood unreversed, may have been counted on in numerous cases as definitely establishing the law. Valuable property may have been dealt with in reliance on it, important contracts may have been made on the strength of it; it may have become to a great extent a basis of expectation and the ground of mutual dealings. Justice may therefore imperatively require that the decision though founded in error, shall stand inviolate none the less, *communis error facit jus.* 'It is better,' said Lord Eldon, 'that the law should be certain than that every Judge should speculate upon improvements in it.'" (Salmond's Jurisprudence, page 194, 7th Edition.)

To turn now to the second question, *i.e.* the question as to whether the Controller had power to cancel the order which he had passed under section 12 (*1*) of the Urban Rent Control Act, 1946, granting permission to the 1st defendant-respondent to continue in occupation of the premises. Sub-section (*2*) of the section provides :

"Subject to any orders passed by a Court under section 13 every order passed under sub-section (*1*) granting permission to any person to continue in occupation of any premises shall remain in force for so long as the provisions of this section apply to the area in which the said premises are situated or the class of premises within which the said premises come and for three months afterwards :

Provided that if during this period a person in whose favour an order has been passed shall voluntarily vacate the premises the Controller may, on the written application of the landlord, cancel such order and shall not thereafter renew it."

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The Act contains no other provision for cancellation of the order granting permission to continue in occupation. So it must remain in force for so long as the provisions of section 12 apply to the area in which the premises are situated or the class of premises within which the said premises come and for three months afterwards, unless in the meanwhile a Court passes an order for ejectment of the occupant under section 13 (*1*) of the Act or the Controller cancels it under the proviso to section 12 (*2*) thereof on the ground that the occupant has voluntarily vacated the premises. The Controller has no power to cancel it on any other ground.

With reference to the argument that the Controller should have wider power to cancel the order, the learned Judge on the Original Side has rightly observed in the course of his judgment :

> " Mr. Joseph also contends in support of his case on this point that if the Controller is not entitled to set right what obviously was wrong, a miscarriage of justice will remain unremedied. That may be so. But this is a matter which should be rectified by legislation and not by this Court."

We are in entire agreement with the learned Judge on the Original Side that the plaintiff-appellant cannot remove the 1st defendant-respondent from the present possession of the premises. We accordingly dismiss the appeal with costs.

U SAN MAUNG, J.—I agree.