

1908.
September 7.

Present : Mr. Justice Wood Renton.

KIRI BANDA v. SLEMA LEBBE *et al.*

C. R., Gampola, 10,205.

Res judicata—*Mesne profits accruing pending action—Separate action—Civil Procedure Code, ss. 35, 196, and 207.*

Plaintiff sued the defendant in *C. R., Gampola, 9,395*, for a declaration of title to a divided share of a certain land and also mesne profits, and obtained judgment on February 28, 1907. The plaintiff subsequently instituted this action claiming mesne profits or damages from March, 1907. The defendant pleaded the previous action (*C. R., Gampola, 9,395*) in bar of the present claim.

Held, that the plea was entitled to succeed, and that the plaintiff's present action was barred by the operation of sections 196 and 207 of the Civil Procedure Code.

A PPEAL by the defendants from a judgment of the Commissioner of Requests (*W. de Livera, Esq.*).

A. St. V. Jayewardene, for the defendants, appellants.

There was no appearance for the plaintiff, respondent.

Cur. adv. vult.

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This is an appeal against a decree of the Commissioner of Requests, Gampola, in which the respondent sued the appellants for quiet possession of a divided share of a certain land, and also for Rs. 4,600 by way of damages, Rs. 4 a month further damages *pendente lite*. The damages claimed are in the nature of mesne profits. The appellants in their defence made answer that the action was barred, inasmuch as the matter in dispute between the parties had been raised in a previous case (C. R., Gampola, 9,395), and had already been decided.

At the trial no evidence was led, and the case has proceeded so far only on the point of law raised in the appellants' answer.

Since the argument of this appeal, I have called for the record in C. R., Gampola, 9,395, and it appears thereupon that the action was instituted on August 2, 1906, and came on for trial on February 28, 1907.

In the present case the respondent claims mesne profits from March, 1907, onwards, and the question of law that has to be decided is whether it was competent for him to embody that claim in his original action so as to make the decree in that action conclusive against his right to sue for such mesne profits now.

The learned Commissioner of Requests has decided this point in favour of the respondent. He says that it is settled law that mesne profits before the institution of a first suit cannot be sued for in a subsequent suit, but that the present case is for damages in respect of mesne profits after the institution of the first suit, and after trial of that suit. He holds, therefore, that an action is maintainable.

I agree with Mr. Jayewardene that this decision is wrong. It is clear that under section 207 of the Civil Procedure Code a decree passed by the Court is final between the parties in regard to every form of relief which was capable of being claimed in the action, and as section 196 of the Civil Procedure Code provides that when an action is brought for the recovery of the possession of immovable property yielding rent or other profit, the Court may, when such a prayer is embodied in the plaint, award the plaintiff in the decree mesne profits from the date of the institution of the action until the delivery of possession to the party in whose favour the decree is made. I think that it was competent for the respondent to have claimed such mesne profits in his original suit. So far as it goes, the decision of Sir Charles Peter Layard, in the case of *Kirihamy v. Dingiri Amma*,¹ supports the view of the law that I have taken in the present case. In view of the provisions of section 196 of the Civil Procedure Code, I do not think that the clause in section 35 (1) (a), which enables a plaintiff to join with an action for immovable

¹ (1905) 1 Bal. 146.

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September 7. reason of the fact that it is immediately followed by the words " or
WOOD arrears of rent," to be restricted to mesne profits prior to the
RENTON J. institution of the suit. The decree appealed against must be set
aside, and the respondent's action dismissed with costs here and
below.

Appeal allowed.

