APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of June, two thousand twenty.

PRESENT:
BARRINGTON D. PARKER,
MICHAEL H. PARK,
WILLIAM J. NARDINI,
Circuit Judges.

Tuhin Kumar Biswas,
Plaintiff – Appellant,

v.

Ethan Rouen, Suresh Nallareddy, Urooj Khan, Fabrizio Ferri, Doron Nissim, Columbia University, In The City of New York,
Defendants - Appellees.

19-3452

FOR PLAINTIFF-APPELLANT:
Tuhin Kumar Biswas, *pro se*, Kolkata, West Bengal, India.

FOR DEFENDANTS-APPELLEES:
Andrew William Schilling, Brian Jeffrey Wegrzyn, Buckley LLP, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Abrams, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Appellant Tuhin Kumar Biswas, proceeding *pro se*, appeals the district court's judgment dismissing his complaint without leave to amend. Biswas asserted that Defendants, a graduate student and certain professors, plagiarized a paper he had written while he was a student at Columbia University and raised the following claims: "intellectual property violation;" breach of trust; destruction of evidence; and fraudulent procedure. In his opposition to Defendants' motion to dismiss, he also raised, *inter alia*, claims under the First and Ninth Amendments. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. Dismissal

"We review the grant of a motion to dismiss de novo, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Fink v. Time Warner Cable*, 714 F.3d 739, 740–41 (2d Cir. 2013). To survive a Rule 12(b)(6) motion to dismiss, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (Although "a court must

accept as true all of the allegations contained in a complaint," this tenet is "inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Contrary to Biswas's contentions on appeal, the district court properly cited the standards in *Iqbal* and *Twombly*. In any event, the district court did not rule that Biswas's factual allegations were conclusory; instead, it held that Biswas's allegations failed to state any federal claim.

We agree. Biswas's plagiarism allegations fail to state a claim under the Copyright Act because he did not register his paper for copyright. *See* 17 U.S.C. § 411(a) ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made[.]"); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019). Despite Biswas's argument that plagiarism can be adjudicated outside the Copyright Act, he identifies no other law supporting such a cause of action.

To the extent that Biswas sought to raise civil rights and constitutional claims, those claims fail because Columbia University and its employees are private actors. *See Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 263 (2d Cir. 2014) ("Because the United States Constitution regulates only the Government, not private parties, a litigant . . . who alleges that h[is] constitutional rights have been violated must first establish that

the challenged conduct constitutes state action." (internal quotation marks omitted)). Biswas's argument that Columbia University is subject to the First Amendment based on its internal activities supporting the Amendment is meritless because it does not allege state action. *See Grogan*, 768 F.3d at 264 (the state-action requirement is met where the "allegedly unconstitutional conduct is fairly attributable to the State" (internal quotation marks omitted)).

Because Biswas failed to state a federal claim, the district court properly dismissed the complaint and declined to exercise supplemental jurisdiction over any state-law claims. *See Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) ("[A] district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction." (internal quotation marks omitted)).[1]

Finally, we decline to consider Biswas's arguments raised for the first time on appeal,

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[1]Biswas has waived any argument that the district court had diversity jurisdiction over his state-law claims. *See LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2d Cir. 1995) ("[W]e need not manufacture claims of error for an appellant proceeding *pro se*, especially when he has raised an issue below and elected not to pursue it on appeal."). In any event, the district court correctly held that it lacked diversity jurisdiction because both Biswas and at least one of the defendants were citizens of India. *Universal Licensing Corp. v. Paola del Lungo S.p.A.*, 293 F.3d 579, 581 (2d Cir. 2002) ("[D]iversity is lacking . . . where on one side there are citizens and aliens and on the opposite side there are only aliens.").

including his Sherman Act claim and his assertion that the district court should have recused itself. *See Harrison v. Republic of Sudan*, 838 F.3d 86, 96 (2d Cir. 2016) ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (internal quotation marks and alterations omitted)).

II. Denial of Leave to Amend

Denials of leave to amend based on futility are reviewed *de novo*. *Hutchison v. Deutsche Bank Secs. Inc.*, 647 F.3d 479, 490 (2d Cir. 2011). Typically, a pro se plaintiff must be "grant[ed] leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (internal quotation marks omitted). Leave to amend need not be granted, however, where amendment would be "futile." Id. Amendment is futile where the problems with the complaint's claims are "substantive" and not the result of "inartful[ ]" pleading. *Id.*

The district court properly held that granting Biswas leave to amend would be futile because Biswas failed to state a federal claim for relief. The deficiencies in his claims—lack of copyright registration and state action—are substantive and not the result of inartful pleading.

We have considered all of Biswas's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court
s/ Catherine O'Hagan Wolfe
UNITED STATES
☆ SECOND CIRCUIT ☆
COURT OF APPEAL

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TUHIN KUMAR BISWAS,

Plaintiff,

v.

ETHAN ROUEN, SURESH NALLAREDDY, UROOJ KHAN, FABRIZIO FERRI, DORON NISSIM, and COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendants.

18-CV-9685 (RA)

MEMORANDUM OPINION AND ORDER
DATE FILED: 10/16/19

RONNIE ABRAMS, United States District Judge:

Plaintiff Tuhin Kumar Biswas, proceeding pro se, has filed this action against Defendants Ethan Rouen, Suresh Nallareddy, Urooj Khan, Fabrizio

Ferri, Doron Nissim, and Columbia University (collectively, "Defendants") for committing an "intellectual property violation under oath in the form of plagiarism," breach of trust, destroying evidence, and fraud. Defendants now move to dismiss Plaintiffs complaint. For the reasons that follow, Defendants' motion is granted.

BACKGROUND

I. Factual Background

The following facts are adopted from Plaintiffs complaint, and are assumed to be true for the purposes of this motion. *See Stadnick v. Vivint Solar, Inc.*, 861 F.3d 31, 35 (2d Cir. 2017).

Plaintiff is an Indian citizen currently residing in Kolkata, India, who, from August 2012 to August 2015, was a PhD student in Columbia Business School's ("CBS's") Accounting Department (the "Department"). *See* Compl. at 10. Defendant Rouen is a former PhD student at CBS. *See id.* Defendant Nallareddy is the former PhD coordinator of the Department, *see id.* at 11; Defendant Ferri is the former Chair of the Department, *see id.*; and Defendant Nissim is a faculty member in the Department, *see id* at 9, 11.

According to Biswas, in the Fall of 2012, he attended Professor Robert F. Engle's "PhD Financial Econometrics" class at New York University, where he began formulating certain "ideas and empirical methods" for a paper. *Id.* at 10. On September 8, 2014, Biswas, for the first time, presented slides from his subsequent paper,

"Accounting Factors Driving Book-to-Market in Predicting Aggregate Stock Returns." *Id.* Shortly thereafter, Biswas circulated this paper within the Department. *See id.*

On April 13, 2015, a paper entitled "On the Disparity between Corporate Profits and Economic Growth," co-authored by Defendants Khan, Nallareddy, and Rouen, was circulated among the Department members. *See id.* Two days later, this paper was presented to the CBS department by Nallareddy. *See id.* According to Plaintiff, the latter paper had "some key concepts and empirical applications" that were "very skillfully adapted and applied without citing [his] paper" or the papers referenced therein. *Id.*

Sometime in 2015, both papers were selected for presentation at the Trans-Atlantic Doctoral Conference held at London Business School. *See id.* Plaintiff asserts that, after "some of the concepts and empirical adaptations of [his] paper [were] highlighted" at this conference, the authors of the other paper "became aware of the danger of being caught" for copying his work and "took cover-up steps to hide [their] plagiarism." *Id.* This included removing certain keywords from their paper to make it seem less similar to Plaintiff's. See id at 11-12. On October 21, 2015, Plaintiff claims that he was "forcefully terminated" from the PhD program and instead awarded a Master's of Science in Business Research. *Id.* at 10. Plaintiff subsequently returned to India. *See id.*

On April 15, 2016, Plaintiff filed a complaint with the University Office of Equal Opportunity and Affirmative Action (the "EEOA") and CBS, formally alleging that his paper had been plagiarized by Rouen, Nallareddy, and Khan. *See id.* at 13. The EEOA referred this matter to the Doctoral Program at CBS, which, according to Biswas, "seemed to show reluctance in dealing with [his] intellectual property violation case and took an unusually long time in dealing with the issue." *Id.* Plaintiff further asserts that, from early June 2016 onward, CBS blocked his Columbia University email accounts. *See id* at 13, 14.

On September 23, 2016, Plaintiff was informed by the Office of Research Compliance and Training (the "RCT") that "the University's Standing Committee on the Conduct of Research" (the "Committee") had initiated an inquiry into his plagiarism claim. *Id.* at 14. On December 30, 2016, the Committee's draft inquiry report was sent to Plaintiff for comment. *See id.* at 15. According to Biswas, "the draft Inquiry Report did not find anything suspicious to warrant an Investigation." *Id.* Plaintiff filed several objections. *See id.* First, Plaintiff claimed that there existed a conflict-of-interest, as "one of the [Committee] members was the spouse of one of the Professors acknowledged in both the Plagiarized Paper" and a subsequent paper authored by Rouen, Nallareddy, and Khan; second, Plaintiff protested that, whereas the accused was allowed to correspond with the Committee, he had been given no opportunity to

do so; and, finally, Biswas argued that the draft inquiry report's acceptance of the accused's defenses was flawed. *See id.*

According to Plaintiff, the RCT agreed to form a new preliminary inquiry committee (the "New Committee") based on the conflict of interest that he had identified in his objections. *See id.* at 16. The New Committee informed Biswas that it would not have access to the old draft inquiry report, and invited Plaintiff to meet with it to discuss his plagiarism claims. *See id.* On March 8, 2017, Plaintiff addressed the New Committee via video conference. *See id.* At this conference, Plaintiff asserts that the committee members were "trying to save the accused." *Id.*

On March 30, 2017, Plaintiff received the New Committee's draft report, which, "like the earlier one, concluded that [his] allegations [were] baseless." *Id.* at 17. In response, Biswas contended that this new report was also "erroneous, incomplete, and inadequate." *Id.* In particular, Plaintiff asserted that: (1) the RCT based the new draft report on an inaccurate transcript of the March 8, 2017 hearing that Plaintiff had not "endorsed," *id.*, and (2) this report was based on various "manufactured and pre-dated documents," *id.* at 17. The New Committee rejected Plaintiffs objections, and finalized the report on May 25, 2017. *See id.* at 18.

Shortly after receiving the final report, Biswas informed the New Committee that he would seek "legally appropriate platforms outside Columbia

for redressal of [his] grievances." *Id.* at 18. Plaintiff alleges that, in response, he received an email from a Columbia University representative requesting his silence. *See id.* Nevertheless, on September 1, 2017, Biswas filed a complaint with the U.S. Department of Justice, Civil Rights Division, Education Section ("DOJ"). *See id* at 18, 11. A week later, he reported this issue to the Department of Homeland Security ("DHS"). *See id.* at 11. On April 6, 2018, DOJ advised Plaintiff that it could not take any action in this matter. *See id.* at 18. It is not clear whether Biswas has received any response from DHS.

II. Procedural Background

On October 17, 2018, Plaintiff filed the instant complaint. *See* Dkt. 1. Plaintiff makes four principal claims. *See* Compl. at 5. First, Biswas alleges that Defendants Rouen, Nallareddy, and Khan committed an "Intellectual Property Violation under oath in the form of Plagiarism of [his] research paper," and that Defendants Ferri, Nissim, and Columbia University aided and abetted this plagiarism. *Id.* at 5-6. Second, Plaintiff contends that all six Defendants committed a "Breach of Trust" by failing to "inquire, investigate, and adjudicate [his] Plagiarism case." *Id.* Third, Biswas asserts that, by blocking his university email accounts in June 2016, Defendant Columbia University committed "Destruction of Evidence" in an attempt to cover up communications that may have lent credence to his plagiarism claim. *Id.* Finally, Plaintiff alleges

that all six Defendants committed fraud by, among other things, poorly handling his plagiarism case and basing the final inquiry report on manufactured and backdated documents and an inaccurate transcript of the May 8, 2017 video conference. *See Id* at 5-6, 13. By way of relief, Plaintiff seeks: (1) $20,000,000 from Defendants for "stealing/extorting [his] hard produced (in extremely hostile conditions) Intellectual Property"; (2) revocation of the individual Defendant's honors, degrees, etc. from Columbia University; and (3) an "[a]ppropriate and [a]cceptable apology letter from Columbia University." *Id.* at 6.

On April 1, 2019, Defendants moved to dismiss the complaint pursuant to Rule 12(b)(1), 12(b)(5), and 12(b)(6) of the Federal Rules of Civil Procedures.[1] *See* Dkts. 33, 34. Plaintiff opposed this motion on April 12, 2019, *see* Dkt. 36, and Defendants replied on April 19, 2019, *see* Dkt. 40.

STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

[1] For the reasons provided in this Opinion, the Court principally dismisses Plaintiff's claims pursuant to Rule 12(b)(6).

reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Pro se complaints, in particular, are to be liberally construed, and "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (internal quotation marks omitted). But even the pleadings of pro se plaintiffs "must contain factual allegations sufficient to raise a 'right to relief above the speculative level.'" *Dawkins v. Gonyea*, 646 F. Supp. 2d 594, 603 (S.D.N.Y. 2009) (quoting *Twombly*, 550 U.S. at 555).

ANALYSIS

I. Plaintiff's Plagiarism Claim

In his complaint, Plaintiff first alleges that Defendants committed an "Intellectual Property Violation under oath in the form of Plagiarism" by copying key concepts in his paper without crediting him, or aided and abetted this violation. Compl. at 5. Specifically, Plaintiff asserts that, by using "intellectual property in the form of [his] research paper" without attribution, Defendants breached a "signed oath not to indulge in academic dishonesty" with respect to another's work. *Id.* at 10.

Plaintiff does not identify a specific cause of action allowing for such allegations to be brought in this Court, however. Accepting Biswas's allegations as true, the individual Defendants may have plagiarized ideas from Plaintiffs paper in violation of university policy. But such an alleged violation is for the university, and not the judiciary, to adjudicate. *See Leary v. Manstan*, 3:13-cv-00639 (JAM), 2018 WL 1505571, at *2 n.1 (D.Conn. March 27, 2018) ("True plagiarism is an ethical, not a legal offense and is enforceable by academic authorities, not courts.") (quoting *Black's Law Dictionary* 1170 (7th ed. 1999)).

Defendants nevertheless treat Plaintiff's plagiarism claim as one brought under the Copyright Act. *See* Defs'. Br. at 10-14 (arguing that Plaintiffs plagiarism claim is preempted by the Copyright Act and fails to state a claim for copyright infringement). It is true that "when a party asserts that it did not receive proper credit, the claim is in effect, plagiarism, and is cognizable—if at all—only under the Copyright Act." *Contractual Obligations Prods. LLC v. AMC Networks, Inc.*, No. 04 Civ. 2867 (BSJ)(HBP), 2007 WL 9683718, at *4 (S.D.N.Y. March 30, 2007) (internal quotation marks omitted). In his opposition, however, Plaintiff appears to disavow that he has raised a copyright claim before this Court. *See* Pl.'s Opp. at 25 ("[T]his lawsuit is not brought specifically under the violation of Copyright laws in the United States."); *id.* at 4

(stating that "Copyright and Plagiarism are two different issues").[2]

In any event, Biswas concedes that he did not register his paper with the copyright office, and that a copyright infringement claim would thus not be "legally enforceable by [][him] in the United States." Pl.'s Opp. at 26. Plaintiff is correct. "Section 411(a) of the Copyright Act provides, with certain exceptions not relevant here, that 'no civil action for infringement of the copyright in any United States work shall be instituted until ... registration of the copyright claim has been made.'" *Malibu Media, LLC v. Doe*, 18-CV-10956 (JMF), 2019 WL 1454317, at *1 (S.D.N.Y. Apr. 2, 2019) (citing 17 U.S.C. § 411(a)).[3]

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[2] Plaintiff did, however, allege in the complaint that Defendants committed an "Copyright Violation under Oath." Pl.'s Compl. at 2

[3] In his opposition, Plaintiff appears to also suggest that his plagiarism claim can be brought under 42 U.S.C. § 1985 (Conspiracy to Interfere with Civil Rights), 18 U.S.C. § 371 (Conspiracy to Defraud the United States), the First Amendment, and the Ninth Amendment. See Pl's Opp. at 2. Plaintiff provides no support for these potential causes of action, however, other than listing them at the beginning of his opposition memorandum. "Even in a pro se case ... although a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) (internal quotation marks omitted).

Accordingly, Plaintiffs plagiarism claims, whether brought as a free-standing cause of action or based in copyright law, do not succeed.

II. Plaintiff's Remaining Two Claims

To the extent that Plaintiff alleges claims against Defendants for (1) breach of trust and (2) fraud, both of these claims arise in state law.[4] See Levitin v. Paine Webber, Inc., 159 F .3d 698, 701 (2d Cir. 1998) (distinguishing between federal claims and state law claims such as breach of trust and breach of fiduciary duty); Grace Int'l Assembly of God v. Festa, 17-cv-7090 (SJF)(AKT), 2019 WL 1369000, at *9 (E.D.N.Y. March 26, 2019) ("The remaining claims asserted by Plaintiff- breach of contract, negligence, fraud and breach of trust – all arise under state law.").

Generally speaking, courts decline to exercise supplemental jurisdiction once they have dismissed all claims over which they have original subject matter jurisdiction. *See Anegada Master Fund, Ltd. v. PXRE Grp. Ltd.*, 680 F. Supp. 2d 616, 624-25 (S.D.N.Y. 2010). Because Plaintiff's only potential federal claim, that for copyright infringement, has been dismissed, the Court

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[4] Because courts do not recognize "Destruction of Evidence" as a stand-alone cause of action, the Court does not consider it as an independent claim. See, e.g., Diaz v. City University of New York, No. 13 Cv 2038 (PAC) (MHD), 2014 WL 10417871, at *30 (S.D.N. Y. Nov. 10, 2014) ("Spoliation does not itself provide an independent cause of action.").

declines jurisdiction over his remaining causes of action.[5]

III. Leave to Amend

"[W]here dismissal is based on a *pro se* plaintiff's failure to comply with pleading conventions, a district court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Henriquez-Ford v. Council of Sch. Supervisors and Administrators*, No. 14-CV-2496 (JPO), 2016 WL 93863, at *2 (S.D.N.Y. Jan. 7, 2016) (internal quotation marks omitted). That said, whether to grant or deny leave to amend is committed to the "sound discretion of the district court," and may be

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[5] In his opposition, Plaintiff seems to assert that, because his remaining claims concern violations of his civil rights, these claims also arise under federal law and this Court would therefore have jurisdiction over them. See Pl.'s Opp. at 23, 28-29. "Columbia University and its employees are not state actors," however, and are therefore not subject to suit under 42 U.S.C. § 1983. Milton v. Alvarez, No. 04 Civ. 8265 (SAS), 2005 WL 1705523, at *3 (S.D.N.Y. July 19, 2005). Nor does the Court have diversity jurisdiction over this case, as both Plaintiff and Defendant Nallareddy are citizens of India. See Nallareddy Decl., Dkt. 35, at 1 ¶ 3 ("I am a citizen of India, and I am not a citizen...of the United States."); see also Universal Licensing Corp. v. Paola del Lungo S.p.A., 293 F.3d 579, 581 (2d Cir. 2002) ("[D]iversity is lacking ... where on one side there are citizens and aliens and on the opposite side there are only aliens.").

denied when amendment would be futile because the amended pleading would not survive another motion to dismiss. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007); *see Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 34 7 Fed. App'x 617, 622 (2d Cir. 2009) ("Granting leave to amend is futile if it appears that plaintiff cannot address the deficiencies identified by the court and allege facts sufficient to support the claim.").

In this case, the Court does not believe that granting Plaintiff leave to amend would be productive. As described above, his plagiarism claim is not cognizable in this court, and he has conceded the absence of a potential copyright claim. Finally, all of his remaining claims arise in state, not federal, law.

The Court therefore dismisses Plaintiff's plagiarism claim with prejudice, and dismisses his state law claims without prejudice.

CONCLUSION

For the foregoing reasons, Plaintiff's complaint is dismissed. The Clerk of Court is respectfully directed to terminate Dkt. 33 and to close this case.

SO ORDERED.

Dated: October 16, 2019
New York, New York

s/ Ronnie Abrams
Ronnie Abrams
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENDORSEMENT

Tuhin Kumar Biswas v. Etah Rouen, et al.
18 Civ. 9685 (RA) (HBP)

The entry of a Case Management Order in this matter will be deferred pending the outcome of the pending motion to dismiss. As noted in my endorsed order dated April 12, 2019, all discovery in this matter is stayed pending resolution of the motion to dismiss.

Dated: New York, New York
April 29, 2019

SO ORDERED

s/ Henry Pitman
HENRY PITMAN
United States Magistrate Judge

Copy mailed to:

Tuhin Kumar Biswas
CF - 231, Sector - I, Salt Lake
North 24 Parganas, Kolkata
West Bengal 700064
India

Copy transmitted to:

Counsel for Defendants

Hon. Henry B. Pitman
United States Magistrate Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Date: Tuesday, 16 April 2019

CASE NO.: 1:18-cv-09685-RA-HBP Biswas v. Rouen et al

Sub.: Certain issues in relation to material in Documents 32 and 37.

Respected Judge Pitman,

This has reference to Your Order dated March 14, 2019 in Document 32 regarding point 1 in that Order: "Any motions to amend the pleadings or to join additional parties shall be served and filed no later than April 30, 2019."

Since, the Defense Counsel's proposal "that the Court adjourn entry of any case management order and stay discovery pending a ruling on Defendants' dispositive motion" has been granted, the Plaintiff, a *Pro Se*, requests the Court to postpone the above mentioned amended pleadings or joining additional parties ruling to a suitable date after the decision on the Motion to Dismiss vis-a-vis the Complaint and the Plaintiff's Response in Opposition to the Motion to Dismiss and related material in Documents 34 and 35 (as elaborated in Document 36) is arrived at by the Court.

The Plaintiff, a *Pro Se*, apologizes for the delay of one day in responding to Your Honour's deadline of 15th April 2019 to move this request. The Plaintiff has written this request after responding to the Motion to Dismiss and also after seeing the outcome on the Letter of the Defense Counsel regarding the postponement of the case management order and staying of discovery put forward by the Defense Counsel.

The Plaintiff, a *Pro Se*, requests Your Honour to kindly consider this request.

Thank you and sincerely,
s/ Tuhin Kumar Biswas
Tuhin Kumar Biswas
(Plaintiff, *Pro Se*)
CF – 231, Sector – I, Salt Lake,
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Appendix D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of July, two thousand twenty.

Tuhin Kumar Biswas,

Plaintiff - Appellant

v.

Ethan Rouen, Suresh Nallareddy, Urooj Khan, Fabrizio Ferri, Doron Nissim, Columbia University, In The City of New York,

Defendants - Appellees.

ORDER

Docket No: 19-3452

Appellant, Tuhin Kumar Biswas, filed a petition for panel rehearing, or, in the alternative, for

rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court
s/ Catherine O'Hagan Wolfe
UNITED STATES
☆ SECOND CIRCUIT ☆
COURT OF APPEAL

Appendix E

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment of the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Ninth Amendment of the United States Constitution

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

17 U.S.C. § 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be

perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 301. Preemption with respect to other laws

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

15 U.S.C. § 1 - Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of

contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 455 - Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a

"financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter,

because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

FRCP 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Appendix F

SUPREME COURT OF INDIA

PETITIONER:
CHITTURI SUBBANNA

Vs.

RESPONDENT:
KUDAPA SUBBANNA & OTHERS

DATE OF JUDGMENT:
DECEMBER 18, 1964

BENCH:
DAYAL, RAGHUBAR
BENCH:
DAYAL, RAGHUBAR
MUDHOLKAR, J.R.
SIKRI, S.M.

ACT:

Code of Civil Procedure (Act 5 of 1908), O. XX. r. 12-

Preliminary decree not in accordance with rule-Not appealed against-Effect.

Practice and Procedure-Point of law-Raised for the first time at hearing of appeal-If permissible.

HEADNOTE:

In a suit for possession and mesne profits the High Court gave a direction in the preliminary decree that the trial court should make an enquiry into the mesne profits payable by the appellant (judgment debtor), from the date of the institution of the suit, and pass a final decree for payment of the amount found due up to the date of delivery of possession of the properties to the respondent (decree holder). The trial court appointed a Commissioner for making the enquiry, and after considering his report, passed a final decree for a certain amount. No objection was taken by the appellant, either before the Commissioner or the trial court that accounts could be taken under O. XX r. 12 Civil Procedure Code, only for 3 year from the date of the preliminary decree and not till the later date when possession was delivered to the respondent. In his appeal to the High Court also, the appellant did not raise the ground in the memorandum of appeal, but when the appeal was argued he sought to raise the contention. The High Court did not allow him to do

so and dismissed the appeal. Along with the appeal the High Court dealt with the cross objections preferred by the respondent in which he claimed enhancement of the amount of mesne profits and partially allowed the cross objections. In the appeal to the Supreme Court it was contended that (i) the High Court was in error in not allowing the appellant to raise the objection based on O.XX, r. 12 of the Code, (ii) the respondent was not entitled to be granted mesne profits for a period beyond three years from the date of the preliminary decree and (iii) the High Court was in error in enhancing the amount of mesne profits.

HELD (Per Raghubar Dayal and Sikri, JJ.) : (i) The High Court was in error in not allowing the appellant to urge the additional ground before it. [669 B-C]

It was a pure question of law not dependent on the determination of any question of the fact and such questions are allowed to be raised for the first time even at later stages. Even though the High Court has discretion to allow or refuse an application for raising an additional ground, the order refusing permission could be interfered with by the Supreme Court, because, it was not in conformity with the principle that a question of pure law can be urged at any stage of a litigation. [664 H; 666D-F-G]

There was no question of the appellant conceding before the Commissioner or electing before the trial court that mesne profits could be calculated till the date of delivery of possession when no dispute about the matter had arisen between the parties. [666 H]

Further, the respondent could not have been prejudiced by the appellant raising the new ground at the hearing of the appeal and not earlier,

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for, even if the appellant had raised it before the Commissioner the respondent could not have sued for mesne profits beyond three years, as, by that time, the period of limitation for such a suit had expired. [669 A-B]

(ii) A decree under O.X.X., r. 12 of the Code, directing enquiry into mesne profits, however expressed, must be construed to be a decree directing the -enquiry in conformity with the requirements of r. 12(1) (c), and so the respondent would not be entitled to mesne profits beyond a period of three years from the date of the preliminary decree. [676 A-B]

It is open to the court to construe the direction in accordance with the provisions of the rule when such direction is not fully expressed so as to cover all the alternatives mentioned therein. [673 F]

The direction in the preliminary decree could not have been appealed against because, the question about the proper period for which mesne profits was to be decreed really comes up for decision at the time of passing the final decree, by which time, the parties would be in a position to know the exact period for which future mesne profits could be decreed-. and so, the appeal could be filed only after a final decree is passed and s. 97 of the Code would be inapplicable. Nor would the direction in the

preliminary decree operate as res judicata either under s. 11 of the Code or on general principles, because there was no controversy between the parties. [674 A; E-H]

Instead of insisting that the court should repeat in the judgment the various alternatives mentioned in the rule, it would be preferable to construe the judgment in accordance with those provisions, and so construed, there is no possibility of a decree holder gaining by his own default. [675DE, G.]

Case law reviewed.

Per Mudholkar, J. (Dissenting) : (i) The High Court was right in refusing leave to the appellant to raise a new ground at the hearing since not only had be not raised it in the memorandum of appeal but he had also allowed an enquiry into mesne profits by the Commissioner for a period longer than 3 years from the date of the decree and participated therein. [683 G]

Further, the grant or refusal of permission was within the discretion of the High Court and the High Court had given very good and cogent reasons for refusing permission. [684 D-E]

When a party omits to raise an objection to a direction given by a lower court in its judgment, he must be deemed to have waived his right and cannot, for the first time at the hearing of an appeal from that decision challenge the courts' power to give the direction. The proper function of an appellate court is to, correct an error in the judgment or proceedings of the court below and not

to adjudicate upon a different kind of dispute a dispute that had been never taken before the court below. It is only in exceptional cases that the appellate court may, in its discretion allow a new point to be raised before it, provided there are good grounds for allowing it to be raised and no prejudice is caused to the opponent. [686G; 688 E-G]

Case law considered.

(ii) On the merits of the contention, even assuming that the direction in the preliminary decree was wrong, that decision has to be given -effect to as it was not challenged in appeal and therefore had become final under s. 97 of the Code. Unless it is corrected in the manner provided in the Code, it will operate as res judicata between the parties in all subsequent stages of the lis. [689 D-E; 692 B]

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It may be that where the meaning of a term is not clear or is ambiguous, the question of construing it may arise and the court would be doing the right thing in placing upon it a construction conformable to law. But the direction in the instant case did not suffer from vagueness, ambiguity or such incompleteness as well make its enforcement impossible.

[691 B-C]

(iii) (By Full Court) : The High Court had raised the rates of mesne profits without expressing its reasons for holding that the Subordinate Judge was wrong in his findings. The case should therefore be remanded to the High Court and the quantum of

mesne profits determined afresh, but, only up to three years from the date of the preliminary decree according to the majority judgment. [676 E; 681 F; 692 E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 598 of 1961. Appeal from the judgment and decree dated September 13, 1958, of the Andhra Pradesh High Court in Appeal Suit No. 736 of 1952.

A. V. Viswanatha Sastri, K. Rajindra Chaudhuri and K. R. Chaudhuri, for the appellant.

K. Bhimasankaram, K. N. Rajagopala Sastri and T. Satyanarayana, for respondent No. 1.

The Judgment of Raghubar Dayal and Sikri JJ. was delivered by Raghubar Dayal J. Mudholkar J. delivered a dissenting Opinion.

Raghubar Dayal, J.-This appeal, presented on a certificate granted by the High Court of Andhra Pradesh, arises out of execution proceedings in execution of a decree dated March 7, 1938. Kudapa Subbanna, plaintiff No. 2 and respondent No. 1 here, was held entitled to the properties mentioned in Schedules A and C and to 1/24ths share in the

properties mentioned in Schedule B attached to the plaint. The defendants in possession of the properties were directed to deliver possession to the decreeholder. The properties in Schedule B were first to be divided in accordance with the shares specified in para 9 of the plaint and the decree-holder was to be allowed the share to which the first plaintiff was shown to be entitled. The trial Court was directed to make an enquiry into the mesne profits from the date of the institution of the suit and pass a final decree for payment of the amount that be found due up to the date of delivery of possession to the second plaintiff. Possession over the properties in Schedules A and C was delivered to the decree-holder on February 17, 18 and 20, 1943. On June 23, 1945, the decree-holder filed I.A 558 of 1949 to revive and continue the earlier I.A. 429 of 1940 which had been presented for the ascertainment of future profits and was struck off on September 25, 1944. On July 28, 1948, the Subordinate Judge decreed the mesne profits and interest thereon for the period from 1926-27 to 1942-43 with respect to the A and C schedule properties. The amount decreed was Rs. 17,883-8-3 including Rs. 10,790/- for mesne profits. He also decreed mesne profits with respect to the B-schedule properties upto 1946. They are not in dispute now.

On April 22, 1949, Chitturi Subbanna, 1st defendant, appealed to the High Court. The decree-holder filed cross- objections and claimed Rs. 19,000/- more stating that the amount of mesne

profits actually due to him would be about Rs. 45,0001- but he confined his claim to Rs. 19,000/- only. On September 13, 1958, the High Court dismissed the appeal, but allowed the cross-objection, the result of which was that the amount of mesne profits decreed by the Subordinate Judge with respect to the A and C schedule properties was increased very substantially. The amount decreed for mesne profits was raised to Rs. 17,242-12-0 and, consequently, the amount of interest also increased. Chitturi Subbanna then obtained leave from the High Court to appeal to this Court as the decree of the High Court was one of variance and the value of the subject matter in dispute was over Rs. 10,000/-.

Chitturi Subbanna, appellant, applied to the High Court for permission to raise an additional ground of appeal to the effect that the trial Court was not entitled to grant mesne profits for more than 3 years from the date of the decree of the High Court. The High Court disallowed that prayer for the reasons that he had not taken such a ground in the memorandum of appeal and had, on the other hand, conceded before the Commissioner and the trial Court that accounts could be taken upto 1943 in respect of A and C schedule properties, that he had elected to have the profits deter- mined by the trial Court upto the date of delivery of possession and that if he had taken the objection earlier, it would have been open to the second plaintiff-respondent to file a suit for the recovery of mesne profits beyond the three years upto the date of deli- G very of

possession. It is urged before us for the appellant that the High Court was in error in not allowing the appellant to have raised the objection based on the provisions of O .20, r. 12, C.P.C. We agree with this contention. The question sought to be raised was a pure question of law and was not dependent on the determination of any question of fact. The first appellate Court ought to have allowed it. Such pure questions of law are allowed for the first time at later stages too.

The appellant could not have claimed-and did not claim a right to urge the new point which had not been taken in the grounds of appeal. He made a separate application for permission to take up that point. The procedure followed was in full conformity with what had been suggested in *Wilson v. United Counties Bank, Ltd.* (1) to the effect :

> "If in exceptional cases parties desire to add new grounds to those of which they have given notice, it will usually be convenient, by a substantive application, to apply to the indulgence of the Court which is to hear the appeal."

In *Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari*(2) this Court allowed a question of law to be raised at the hearing of the appeal even though no reference to it had been made in the Courts below or in the grounds of appeal to this Court. This Court said :

> "If the facts proved and found as established are sufficient to make out a case of fraud within the meaning of section 18, this objection may not be serious, as the question of the applicability of the

section will be only a question of law and such a question could be raised at any stage of the case and also in the final court of appeal. The following observations of Lord Watson in *Connecticut Fire Insurance Co. v. Kavanagh* ([1892] A.C. 473) are relevant. He said : "When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the court of ultimate review is placed in a much less advantageous position than the courts below."

Again, it was said in *M. K. Ranganathan v. Government of Madras* (3) :

"The High Court had allowed the Respondent 3 to raise the question even at that late stage inasmuch as it was a pure question of law and the learned Solicitor-

(1) L.R. [1920] A.C. 102,106.

(2) [1950] S.C.R. 852.

(3) (1955) 11 S.C.R. 374, 381.

General therefore rightly did not press the first contention before us."

In *Ittyavira Mathai v. Varkey Varkey*(1) this Court did not allow the question of limitation to be raised

in this Court as it was considered to be not a pure question of law but a mixed question of law and fact. This Court said at p. 911 :

> "Moreover, the appellants could well have raised the question of limitation in the High Court in support of the decree which had been passed in their favour by the trial Court. Had they done so, the High Court would have looked into the records before it for satisfying itself whether the suit was within time or not. The point now raised before us is not one purely of law but a mixed question of fact and law. No specific ground has even been taken in the petition made by the appellant before the High Court for grant of a certificate on the ground that the suit was barred by time. In the circumstances, we decline leave to the appellant to raise the point of limitation before us."

The High Court had discretion to allow the application or to refuse it. The discretion exercised by the High Court is certainly not to be interfered with by this Court except for good reasons.

We shall deal with the reasons given by the High Court for in rejecting the application and, in so doing, indicate why we consider those reasons not to be good reasons for disallowing the prayer made in the application. In *Rehmat-un-Nissa Begam v. Price*(2) the observations at p.66 indicate that a discretionary order can be justifiably disturbed if the Court acts capriciously or in disregard of any legal principle in the exercise of its discretion. This, however, cannot be taken to be exhaustive of the

grounds on which the discretionary order is to be interfered with. In this particular case the order passed by the High Court was not in conformity with the principle that a question of pure law can be urged at any stage of the litigation, be it in the court of the last resort. There was no question of the appellant's conceding before the Commissioner that mesne profits could be legally allowed up to the date of delivery of possession. No party had raised the question as to whether mesne profits could be allowed up to three years (1) A.I.R.1964 S.C. 907.
(2) L.R. 45 I.A. 61. subsequent to the date of the High Court decree or up to the later date when possession was delivered. When no such dispute arose, there was no question of the appellant's making any such concession. Similarly, no question of the appellant's electing to have the profits determined by the trial Court up to the date of delivery of possession could have arisen when no dispute about this matter had arisen between the parties. The utmost that can be said is that both the parties, the decree-holder and the judgment-debtor, were under the impression that mesne profits could be awarded till the date of delivery of possession as directed by the decree of the High Court. The fact that -the appellant raised no such objection before the Commissioner or the trial Court, does not mean that he had given his consent for the determination of mesne profits for the period subsequent to the expiry of 3 years from the date of the High Court decree and that the order of the trial Court for the payment of mesne profits up to the date of delivery

of possession is an order based on the consent of the parties.

In the circumstances of the case, we are not prepared to hold that the omission of the appellant to raise the point before the trial Court amounts to his waiving his right to raise the objection on the basis of O.20, r. 12, C.P.C.