APPELLATE CIVIL.

Before Mukerji A. C. J. and S. K. Ghose J.

SURENDRALAL CHAUDHURI

v.

SULTAN AHMAD.*

1934

July 12, 13, 26, 31.

Restitution—Mesne *profits, how to be calculated—Code of Civil Procedure (Act V of 1908), ss. 2(12), 144.*

The mesne profits which a party obtaining restitution under section 144 of the Code of Civil Procedure is entitled to get are to be calculated, not on the basis of what he could have made had he not been deprived of possession, but what his opponent did in fact make or could with reasonable diligence have made, except in cases in which, in addition to mesne profits claimed on the ground of the wrong-doer remaining in possession, damages or compensation may be claimed on other grounds.

In a case where the wrong-doer settles the land with tenants, mesne profits can only be calculated on the basis of rental value of the land and must be either on the basis of such rent as he in fact received or of such rent as he could with ordinary diligence have received.

Gurudas Kundu Chaudhuri v. *Hemendra Kumar Ray* (1), *Gray* v. *Bhagu Mian* (2), *Swarnamayi* v. *Shashi Mukhi Barmani* (3) and other cases referred to.

APPEAL FROM APPELLATE ORDER by the petitioners for restitution.

The material facts of the case are set out in the judgment.

Chandrashekhar Sen (with him *Sateeshchandra Sen*) for the appellants. What the appellants are entitled to is not mesne profits but compensation or damages and it should be assessed on the basis of what my clients could have got, had they been in

*Appeal from Appellate Order, No. 285 of 1932, against the order of S. C. Chakrabarti, Additional Subordinate Judge of Chittagong, dated Feb. 4, 1932, affirming the order of G. C. Ray, Fourth Munsif of Patiya, dated Feb. 26, 1931.

(1) (1929) I. L. R. 57 Calc. 1; L. R. 56 I. A. 290. (2) (1929) I. L. R. 9 Pat. 621; L. R. 57 I. A. 105.
(3) (1868) 2 B.L.R. (P.C.) 10; 12 M. I. A. 244.

1934

Surendralal Chaudhuri v. *Sultan Ahmad.*

possession: *Hurro Chunder Roy Chowdhry* v. *Sooradhonee Debia* (1), *Dorasami Ayyar* v. *Annasami Ayyar* (2), *Parbhu Dayal* v. *Ali Ahmad* (3) and *Dawood Hashim Esoof* v. *Tuck Shein* (4).

Imam Husain Chaudhuri (with him *Beereshwar Chatterji*) for respondents. The appellants were dispossessed under a decree. There is no case of any damage done to the property by the respondents. In the circumstances, the appellants can only get mesne profits calculated on the basis of the rent realised by the respondents.

Cur. adv. vult.

MUKERJI A. C. J. The respondents got a decree for *khâs* possession against the appellants on the 6th April, 1925, and took delivery of possession in execution on the 15th July, 1925. That decree having been set aside on the 1st August, 1928, the appellants applied for restitution of the lands and they were restored to possession on the 23rd August, 1928. Thereafter, the appellants applied for what they called mesne profits, assessing their total claim at Rs. 978. The courts below found that the respondents did not hold the land in *khâs*, but through tenants, with whom they had settled the lands on receiving a *nazar* of Rs. 1,100 and at a rental of Rs. 17 a year. The said courts have awarded the appellants Rs. 51 as the amount of mesne profits for three years, during which they had remained in possession, at the rate of Rs. 17 per year, on the authority of the decision in *Gurudas Kundu Chaudhuri* v. *Hemendra Kumar Ray* (5) and *Gray* v. *Bhagu Mian* (6). They have taken these decisions as laying down that the criterion upon which mesne profits should be ascertained is not what the party dispossessed had lost, but what the party in possession had gained. The said courts refused to give the appellants any part of the *nazar* of Rs. 1,100, holding that, though the respondents had the use of this

(1) (1868) B.L.R. F.B. Vol. 985.
(2) (1899) I.L.R. 23 Mad. 306.
(3) (1909) I.L.R. 32 All. 79.
(4) [1932] A.I.R. (Ran.) 148.
(5) (1929) I. L. R. 57 Calc. 1; L. R. 56 I. A. 290.
(6) (1929) I. L. R. 9 Pat. 621; L. R. 57 I. A. 105.

1934

Surendralal Chaudhuri v. *Sultan Ahmad.*

Mukerji A. C. J.

amount for three years, they were liable for the said amount together with compensation to the tenants who would be justified in realising the same from them.

The decisions of the Judicial Committee upon which the courts below have purported to proceed are authorities for a proposition, which must be regarded as well-settled, that the criterion for the calculation of mesne profits cannot be what the person out of possession might have got if he had been on the land. The very definition of mesne profits given in section 2 (*12*) of the Code of Civil Procedure makes that sufficiently clear, because, according to the definition, it is the profits, which the person in wrongful possession actually received or might with ordinary diligence have received, which are to be regarded. In the former of the two cases there was no case made that the person in wrongful possession could have got more than what he actually received, and so what he actually received was what the rightful owner out of possession was entitled to. The persons in wrongful possession in that case had got the lands with one Srish as a lessee on it, who was holding under a lease from the Government. Their contention was:—

> We are only liable for what we really got, namely, what we got from Srish; allowing Srish to go on as he had done with the Government was perfectly reasonable, you cannot think that it was necessary for us to put out Srish and begin to cultivate ourselves and, therefore, we, in the terms of the Code, are only liable for what we really got.

In the latter of the two cases, the wrong-doers had cultivated the lands themselves; and it was held by their Lordships that the cultivation profits were the primary consideration, but that the profits should not be calculated on the basis of indigo cultivation which was done for the wrong-doer's special purpose, but that the true test must be what an ordinary prudent cultivator must have grown. In the present case, the wrong-doers have not been shown to have cultivated the lands and it is admitted that they had, in fact, settled the lands with tenants. In such a case, mesne profits can only be calculated on the basis of rental value of the land and must be either on the basis of

1934

Surendralal Chaudhuri v. *Sultan Ahmad.*

Mukerji A. C. J.

such rent as the respondents in fact received or could with ordinary diligence have received. In the second of the aforesaid cases their Lordships have observed :—

> The appellant's first contention was that the rental value of the land**** was the proper criterion. This would no doubt ordinarily be so where the person charged had merely let the land out to others. In such a case the rent that he received, if there was no evidence that a higher rent could " with ordinary diligence " have been obtained, would be the measure of the profits for which he would be liable.

Mr. Sen, for the appellants, has argued that it was not mesne profits as defined in the Code but compensation or damages, which words are also used in section 144 of the Code of Civil Procedure, to which his clients are entitled and that such compensation or damages should be assessed on the basis of what his clients could have got if they were not put out of possession. The true position in law is that a person who obtains possession of immoveable property under and by virtue of orders passed in execution proceedings, based upon what at the time was a valid decree but has subsequently been set aside on appeal, can in no sense be regarded as a trespasser during such period : *Swarnamayi* v. *Shashi Mukhi Barmani* (1), *Dhunput Singh* v. *Saraswati Misrain* (2) and *Holloway* v. *Guneshwar Sing* (3). For that period he is liable to his opponent, the real owner, for compensation or damages and not for mesne profits in the strict sense of the expression. And it is also true that since the reversal of the decree in his favour, when it becomes his duty to vacate and hand over possession, he becomes a trespasser and remains liable for mesne profits in such sense so long as he continues in possession. But on no principle can it be said that the measure of damages or compensation during the former period should be higher than during the latter period.

Mr. Sen has drawn our attention to a number of decisions in which it has been laid down that the true principle upon which courts ought to proceed in making an order for restitution is to compensate the

(1) (1868) 2 B.L.R. (P.C.) 10 (14); 12 M.I.A. 244 (253).
(2) (1891) I. L. R. 19 Calc. 267, 271.
(3) (1905) 3 C. L. J. 182.

party injured by giving him all that was, in fact, lost to him by the erroneous decree or order and not by giving him only as much as would come within the definition of mesne profits as given in the Code. The decisions cited in this connection are *Hurro Chunder Roy Chowdhry* v. *Sooradhonee Debia* (1), *Dorasami Ayyar* v. *Annasami Ayyar* (2), *Parbhu Dayal* v. *Ali Ahmad* (3) [which went up on appeal to the Judicial Committee: *Parbhu Dayal* v. *Makbul Ahmad* (4)] and *Dawood Hashim Esoof* v. *Tuck Shein* (5). There is no doubt whatever that it is one of the first and highest duties of all courts to see that the act of the court does no injury to any of the suitors [*Rodger* v. *The Comptoir d' Escompte De Paris* (6)] and that it is the duty of the court under section 144 of the Code of Civil Procedure to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed: *Jai Berham* v. *Kedar Nath Marwari* (7). But, in assessing what a party may have lost or of what he may have been deprived during his dispossession, the law takes into account not what he could have made, but what his opponent did in fact make or could, with reasonable diligence, have made. At first sight this might seem somewhat unjust, but it is not really so, for what the party out of possession could have made if he was left in possession is a loss which, in the vast majority of cases, would be hypothetical, remote and uncertain. Of course, there may be cases where such profit must necessarily have accrued to him in any case, *e.g.*, if the lands were under a lease with a stipulation that in all circumstances a certain rent would be recoverable. But, in such cases, what the party out of possession would have lost is what his opponent could have made by reasonable diligence. There may again be cases in which, in addition to mesne profits claimed on the

(1) (1868) B. L. R. F.B. Vol. 985, 993.
(2) (1899) I. L. R. 23 Mad. 306.
(3) (1909) I. L. R. 32 All. 79.
(4) (1915) I. L. R. 38 All. 163; L. R. 43 I. A. 43.
(5) [1932] A. I. R. (Ran.) 148.
(6) (1871) L.R. 3 P. C. 465.
(7) (1922) I. L. R. 2 Pat. 10; L. R. 49 I. A. 351.

1934

Surendralal Chaudhuri v. *Sultan Ahmad.*

Mukerji A. C. J.

ground of the wrong-doer remaining in possession, damages or compensation may be claimed on other grounds. But the present case is not a case of that character.

In our opinion, therefore, in the present case the assessment of compensation or damages or mesne profits, whichever be the term or expression used, must be on the basis of rent which the defendant actually realised, unless it be that he could with ordinary diligence have realized more. Rupees 17 per year was actually realized, but that was on the basis of a permanent lease for which a premium of Rs. 1,100 was also realized. The court of first instance, in our opinion, should allow the parties to adduce evidence as to the rent which may be realized for the lands on the basis of a yearly tenancy, and such figure as is established should be the basis of assessment.

Two contentions have been put forward on behalf of the respondents for the purpose of repelling the appellants' claim. One is that the claim is barred by the provisions of Order II, rule 2, Civil Procedure Code, in view of the previous application for restoration of possession. This contention has no force and has been rightly overruled by the courts below: *Krupasindhu Roy* v. *Balbhadra Das* (1). Another is that the lands were in the possession of some persons as mortgagees from the appellants and so the respondents could get no actual possession. This is a new contention not noticed by and, it may, therefore, be presumed, was not raised in the courts below; and so it does not deserve any consideration.

The appeal is allowed. The orders of the courts below are set aside and the case is sent down to the court of first instance to be dealt with in the light of the directions given above. The appellants will get their costs in all the courts. Hearing-fee in this Court is assessed at two gold mohurs.

GHOSE J. I agree.

Appeal allowed, case remanded.

A. A.

(1) (1917) 3 Pat. L. J. 367.