

1877

BHIKHAN
KHAN
v.
RATAN KUAR.

ment between the shareholders on the point, the share becomes due on the 30th June in each year.

STUART, C. J.—I concur substantially in the opinion of Mr. Justice Spankie. I observe in the case that was before Mr. Justice Turner and myself in April of last year, *Girdhari Lal v. Lahori* (1), Special Appeal, No. 1336 of 1875, in which we made a remand, we expressed the opinion that the limitation of three years ran “from the date when the profits became payable,” or otherwise, as we go on to explain, “in the absence of any custom or agreement to the contrary, profits become due from the time when they reach the lambardar’s hands”, which I suppose must be taken to be at the end of the agricultural year, that is, in this case, on the 30th of June of each year. But it might be well to inquire whether there is any custom or agreement on the subject in the district of Aligarh where the property here in suit is situated.

FULL BENCH

1877
December 3.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

ALTAF ALI (JUDGMENT-DEBTOR) v. LALJI MAL AND ANOTHER (DECREE-HOLDERS).*

Trespass on Land—Mesne Profits.

Held, by the majority of the Full Bench, that a trespasser on the land of another should, in estimating the mesne profits which the owner of the land is entitled to recover from him, be allowed such costs of collecting the rents of the land as are ordinarily incurred by the owner, where such trespasser has entered or continued on the land in the exercise of a *bonâ fide* claim of right, but where he has entered or continued on the land without any *bonâ fide* belief that he was entitled so to do, the Court may refuse to allow such costs, although he may still claim all necessary payments, such as Government revenue or ground-rent.

Per STUART, C. J.—Whether such trespasser is a trespasser *bonâ fide* or not, he should be allowed such costs.

THIS was an application to recover in execution of a decree the mesne profits of certain villages accruing between the date of the decree and the date on which possession of the villages was obtain-

* Miscellaneous Regular Appeal, No. 59 of 1876, from an order of Rai Baktawar Singh, Subordinate Judge of Bareilly, dated the 2nd August, 1876.

(1) Unreported.

ed under the decree by the decree-holders. The judgment-debtor pleaded, among other matters, that the expenses of collecting the rents should be deducted from the sum claimed by the decree-holders. The Court of first instance refused to make this deduction on the ground that the judgment-debtor had been in wrongful possession of the villages.

The judgment-debtor appealed to the High Court against the order of the Court of first instance allowing execution of the decree, contending, among other things, that the expenses of collection should be allowed to him.

Stuart, C.J., and Pearson, J., before whom the appeal came on for hearing, referred the case to a Full Bench, the order of reference being as follows :

In reference to the second plea in appeal, we observe that the lower Court, in refusing to allow the appellant to charge the estate with the expenses of collection in any shape has relied on the precedent of the 29th November, 1862, No. 780 (1), which, however, only followed the ruling in an earlier case, No. 271 of 1854, decided on the 28th January, 1856, by Begbie, Harington, and M. Smith, J.J., to the effect that a commission on such an account can only be allowed when the possession of the party claiming the same was not wrongful (2). No subsequent ruling of this Court to the contrary has been brought to our notice. But it would appear from the decisions of the Calcutta High Court, dated the 24th January, 1867, in case No. 876 of 1866 (3)—dated the 6th March, 1867, in case No. 875 of 1866 (4)—and the 8th April, 1868, in case No. 621 of 1867 (5), that a different principle is adopted by that Court, and that it is held equitable and reasonable to allow the charges of collection to be defrayed out of the mesne profits of an estate, even when the expenditure has been made by a person wrongfully in possession, on the ground that the rightful owner, had he been in possession, would have had to bear them. We ask the Full Bench to consider and determine which of the two views is the sounder and more correct.

Mr. Conlan and Mir Zalur Husain, for the appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and Pandit Bishambhar Nath, for the respondents.

(1) S. D. A., N.-W. P., 1862, vol. ii, 246.

(4) 7 W. R. 230.

(2) S. D. A., N.-W. P., 1856, p. 49.

(5) 9 W. R. 457.

(3) 7 W. R. 78.

1877

The following judgments were delivered by the Full Bench :

ALTAF ALI
v.
LALJI MAL.

STUART, C.J.—It appears to me that the Calcutta rulings referred to in the order of reference expound the law correctly. The Subordinate Judge says that the defendant held possession of the villages without any reason or right, and he therefore concludes that he is not entitled to any collection-fee or village-expenses; but in this view he is clearly mistaken, not only on the authority of these Calcutta rulings, but on the principle that any claim such as is made against the defendant here must be founded on wrong towards the plaintiff (*Addison on Torts*, p. 11); and the plaintiff can show no such wrong by the fact that the defendant, although wrongfully in possession, had merely made payments which the plaintiff himself, or any other owner, would have had to meet. A recent decision of the Calcutta Court (*Kemp and Pontifex*, J.J.) [1] appears to recognise the same principle, where it was held that no suit for damages as between joint owners on undivided estates will lie in consequence of the sale of the whole estate through the default of one or more of such owners in paying their shares of the Government revenue, the meaning of which ruling appearing to be that no wrong can be pleaded in such a case as the present by the defendant, whether a *bonâ fide* trespasser or not, paying the Government revenue, for that must be paid *as from the land*, and no matter by whom, whether legally or merely ostensibly in possession.

The English case of *Wood v. Morewood* (2) was an action for an injury to the plaintiff's reversion in certain closes by making holes and excavations and getting coals, with a count in trover for coals, and Baron Parke told the jury that "if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals, as if the coal field had been purchased from the plaintiff." In another English case, *Doe v. Hare* (3), referred to in *Mayne on Damages*, ed. 1856, p. 255, it was laid down that "if the defendant has made any payment while in possession for which plaintiff would be liable,

(1) I. L. R. 1 Calc. 406.

(2) 3 Q. B. 446

(3) 2 C. & M. 145.

as ground-rent, he is entitled to have it taken in reduction of damages." But the principle thus recognised appears to me to go further, and I think justify me in holding that, whether the defendant is a trespasser *bonâ fide* or not, he is entitled as against the rightful owner to be credited with all such payments in respect of the land as these collection-fees and other village-expenses.

PEARSON, TURNER, and SPANKIE, JJ., concurring.—When in the exercise of a *bonâ fide* claim of right a trespasser enters on and holds the property of another, the owner is sufficiently compensated by receiving an amount equivalent to the net profits he would have himself received had he been in possession. In such a case then such costs of collection as are ordinarily incurred by the owner might fairly be allowed to the trespasser as well as such sums as must of necessity be paid, as, for instance, Government revenue. But when the trespass is altogether tortious and malicious, in other words, when the trespasser has entered or continued on the property without any *bonâ fide* belief that he is entitled to do so, where in defiance of the rights of another he has thrust himself into an estate, although he may still claim all necessary payments, such as Government revenue or ground-rent, it is not imperative on the Court, in estimating the damages, to allow the wrongdoer even such charges as would ordinarily, but voluntarily, be incurred by an owner in possession, but the Court may refuse to sanction the deduction of such charges—*Wood v. Morewood* (1).

APPELLATE CIVIL

18
Decem

Before Mr. Justice Spankie and Mr. Justice Oldfield.

ABADI BEGAM (DEFENDANT) v. INAM BEGAM (PLAINTIFF).*

Muhammadan Law—Pre-emption

Under Muhammadan law, the legal forms to be observed under that law by a person claiming a right of pre-emption may be observed on behalf of such person by an agent or manager of such person.

* Special Appeal, No. 785 of 1877, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 19th April, 1877, affirming a decree of Maulvi Wajid Ali, Munsif of Kaimganj, dated the 6th March, 1877.